"THE KEY-STONE TO THE ARCH": UNLOCKING SECTION 13's ORIGINAL MEANING

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The Supreme Court of Pennsylvania holds that Section 13 of the State's constitution, which prohibits all "cruel punishments," is coextensive with the Eighth Amendment, which prohibits only punishments that are both "cruel and unusual." Rather than analyze the state provision independently, the court defers to the U.S. Supreme Court's interpretation of the Eighth Amendment. This, says the court, is because Pennsylvania history does not provide evidence that the Commonwealth's prohibition differs from the federal one. And without that historical basis, the court believes it is bound by federal precedent. This is mistaken.

History reveals that Pennsylvanians had a distinct, original understanding of "cruelty." The U.S. Supreme Court has said that the original meaning of the federal provision parroted English criminal prohibitions, permitted retributive justifications, and proscribed only pain superadded beyond death through methods left in the past. This understanding is irreconcilable with the original meaning of Section 13. The Commonwealth's provision, by contrast, parroted Enlightenment criminal philosophy, permitted only deterrence and rehabilitative justifications, and prohibited the addition of any severity contemporary science deemed unnecessary for those ends. The historical record should thus provide, not prevent, a distinctly Pennsylvanian definition of cruelty.

This article provides that historical account. It reviews the influence of Montesquieu and Beccaria's writings on the speeches, pamphlets, and debates of founding Pennsylvanians. It also traverses the text, legislative history, and early Supreme Court of Pennsylvania interpretation of the first penal laws in the Independent State. This penal code, which circumscribed capital punishment and augured the age of the penitentiary, distilled the distinctly Pennsylvania conception of "cruelty" into law. This was the philosophy Pennsylvanians encapsulated in their prohibition on cruel punishments.

Section 13 jurisprudence should therefore build—independently—from the original meaning Pennsylvania's history supplies.

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INTRODUCTION

Pennsylvanians pioneered the penal reform still shaping punishment across the world. Broken from the chains of British rule in 1776, they created a new system of punishments predicated on Enlightenment principles. They believed that only deterrence and reformation justified a punishment. They denounced any severity unnecessary for achieving those ends. And they believed all else was cruel. When Pennsylvanians in 1790 provided a guarantee in Section 13 of the state constitution against all "cruel punishments," these were the principles they instilled in their prohibition.[1]

Guarantees like Section 13 played a prominent role in the revival of state constitutionalism. During the second half of the twentieth century, state courts rediscovered their own charters and departed from U.S. Supreme Court precedent, holding that their own constitutions provide greater legal protections than the Federal Bill of Rights.[2] In the context of criminal justice, these decisions have since enshrined important safeguards, like protecting against police abuse,[3] strengthening due process protections,[4] and reforming sentencing laws for children.[5]

Unique constitutional texts and histories frequently motivate such departures. "To the extent that a state constitutional provision has particular textual or historical features that distinguish it from its federal counterpart," says Supreme Court of California Justice Goodwin Liu, "judicial interpretation can *and must* reflect those state-specific features."[6] This includes when "[s]ome state constitutional provisions with similar wording

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1 PA. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.").

2 *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

3 *See, e.g.*, State v. McCarthy, 501 P.3d 478, 481 (Or. 2021) (explaining that under the Oregon Constitution, "searches and seizures must be conducted pursuant to a warrant or one of the few specifically established and limited exceptions . . .").

4 This has been true both at trial, *see, e.g.*, State v. Caronna, 265 A.3d 1249, 1255 (N.J. Super. 2021) ("the New Jersey Constitution generally provides greater protection against unreasonable searches and seizures than the Fourth Amendment of the United States Constitution.") and at sentencing, *see, e.g.*, State v. Melvin, 258 A.3d 1075, 1078, 1094 (N.J. 2021) (explaining that the New Jersey Constitution offers more protections at sentencing than the United States Constitution).

5 *See, e.g.*, State v. Comer, 266 A.3d 374 (N.J. 2022) (holding that the New Jersey Constitution affords more protection than the Eighth Amendment); State v. Bassett, 428 P.3d 343 (Wash. 2018) (finding that the Washington state constitution provided more protection than the Eighth Amendment in the context of juvenile sentencing).

6 Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1330 (2019) (book review) (emphasis added).

as their federal counterparts have demonstrably state-specific meanings."[7] "The irreducible minimum" argues Chief Judge Jeffrey Sutton of the Sixth Circuit Court of Appeals, "is that state courts decide for themselves the meaning of their own constitutions, each with its own independent traditions and words."[8] These "state-specific meanings," and "independent traditions and words" grounded in "particular textual or historical features that distinguish [a state constitution] from its federal counterpart," can appear across any state constitutional provision. But they lie frequently in state "cruel punishment" clauses.[9]

State constitutional text, history, and original meaning have accordingly shaped a growing body of case law holding that state "cruel" punishment clauses do not mirror the Eighth Amendment. For instance, in 2018 the Washington Supreme Court broke with Supreme Court precedent in the context of juvenile sentencing because "[t]he historical evidence reveal[ed] that the framers of [Wash.] Const. art. 1, § 14 were of the view that the word 'cruel' sufficiently expressed their intent, and refused to adopt an amendment inserting the word 'unusual.'"[10] Likewise, the New Jersey Supreme Court in 1992 noted that while its state guarantee against "cruel and unusual punishments" bears the same text as the Eighth Amendment, "New Jersey's history and traditions" give the clause its own meaning. The New Jersey Constitution "would never," said the court, "countenance racial disparity in capital sentencing,"[11] even though *McCleskey v. Kemp*[12] indicated that "the [U.S.] Supreme Court apparently will not invalidate a death sentence on the basis of racial disparity, no matter how profound."[13] And in 2015, when the Connecticut Supreme Court abolished the death penalty within its borders, it relied the state's "particular sensitivity" to cruel and unusual punishments, stemming "from the earliest days of the colonies, and extending until the adoption of the state Constitution in 1818."[14]

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7 *Id.* at 1328.

8 JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 189 (2018).

9 *See generally* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201 (2019) (discussing the differences between the Eighth Amendment and its state constitutional counterparts).

10 428 P.3d at 349.

11 State v. Marshall, 613 A.2d 1059, 1108 (N.J. 1992), *abrogated on other grounds by* State v. Harris, 757 A.2d 221, 227 (N.J. 2000).

12 481 U.S. 279 (1987).

13 613 A.2d at 1108 ("The United States Supreme Court seems resigned to accept that such '[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.'") (quoting 481 U.S. at 312).

14 State v. Santiago, 122 A.3d 1, 26–27 (Conn. 2015) (explaining Connecticut's statutory and common law freedoms from cruel and unusual punishment).

Following this body of case law, this article analyzes the text, history, and original meaning of Pennsylvania's prohibition on "cruel punishments" in Section 13 of its constitution.[15] The Commonwealth's prohibition is textually and historically distinct from its federal counterpart. It bars the state from inflicting any "cruel punishments," not merely those that are both "cruel and unusual." And Pennsylvania's rich history reveals that its citizens had a distinct understanding of "cruelty." They believed that only deterrence and reformation justified a punishment. They declared that only the least severe infliction for those purposes was permissible. They proscribed as cruel anything unnecessary for those aims. They preached that the assessment of a punishment's cruelty, defined by this specific meaning, must evolve alongside society's scientific understanding. And they distilled that philosophy into Section 13's textually distinct prohibition of every "cruel punishment"—whether unusual or not. Text and history thus mandate independent meaning.

But this history has eluded the Supreme Court of Pennsylvania. It has interpreted Section 13 as coextensive with the Eighth Amendment.[16] And yet, the U.S. Supreme Court's interpretation of the Eighth Amendment's original meaning is incompatible with the original meaning of Pennsylvania's provision. The two are antagonistic. The U.S. Supreme Court has said that the original meaning of the Eighth Amendment derives from England's seventeenth century Declaration of Rights. Section 13, conversely, embraces eighteenth century Enlightenment theories. The Supreme Court has said that the Eighth Amendment's English heritage means that the Amendment originally prohibited only methods of punishment adding terror and disgrace beyond death. But Section 13 dispensed with English tradition by prohibiting any punishment adding severity beyond necessity. Where there is such contrast between state and federal provisions, departure is not only merrited, but mandatory.

This article makes that case in four parts. It first provides background on the Supreme Court of Pennsylvania's approach to state constitutionalism. The article in part two then covers the U.S. Supreme Court's originalist account of the Eighth Amendment's history, before providing a detailed history of the original meaning of the Pennsylvania cognate in part three.

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15 PA. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.").

16 Commonwealth v. Zettlemoyer, 454 A.2d 937, 967 (Pa. 1982) ("[T]he rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments.").

The final section uses that contrast to highlight how the Supreme Court of Pennsylvania's historical account of Section 13—which has thus far justified its belief that the anti-cruelty guarantees are coextensive—is incomplete.

I. SECTION 13 & PENNSYLVANIA'S STATE CONSTITUTIONALISM

Pennsylvania's second constitution, ratified in 1790, included a provision forbidding all "cruel punishments." Despite numerous revisions to the constitution since then, that guarantee has remained unchanged. Adopted a year before the Federal Eighth Amendment, Section 13 bore an independent meaning from the beginning. Its text reflects this.

And so too does its historical, legal, and philosophical foundation. The Commonwealth led the country and indeed the world in penal reform. Its founding thinkers were students of the Enlightenment who believed that the purpose of punishment was to deter and reform; those punishments ought to be proportional to crimes; and, most importantly, they believed that no punishment was permissible unless it was "necessary" for these purposes. Anything more was cruel. And the state's early case law interpreted and applied Section 13 accordingly.

But that would not last. In 1962, the U.S. Supreme Court ruled that the Eighth Amendment applies to—or is "incorporated" against—the states.[17] State constitutions then *coexisted* alongside the Eighth Amendment. Yet, incorporation did not entail that state constitutions were *coextensive* with the U.S. Constitution. Instead, the Eighth Amendment served as a floor of legal rights upon which state analogs, such as Section 13, could build.[18]

And under many state constitutional provisions, the Commonwealth's Supreme Court has erected a scaffold of greater rights. As of 2018, the court had "vindicated distinctive Pennsylvania constitutional rights" in 373 cases.[19] And the 147 criminal procedure departures account for the majority.[20]

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17 Robinson v. California, 370 U.S. 660 (1962); *see e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (noting that *Robinson* is widely understood as the case that incorporates the Eighth Amendment against the States).

18 *See generally* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627 (2021) (examining state court limitations on non-capital punishments through the use of state constitution provisions).

19 Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287, 291, 306 (2018).

20 *Id.* at 312.

That process began in *Commonwealth v. Edmunds*,[21] a "flagship case in the arena of judicial federalism,"[22] which "set forth certain factors to be briefed and analyzed by litigants in each case . . . implicating a provision of the Pennsylvania constitution."[23] Those factors include "(1) [the] text of the Pennsylvania constitutional provision; (2) history of the provision, including Pennsylvania case-law; related case-law from other states . . . ; (4) policy considerations."[24]

After *Edmunds*, history thus became a fundamental factor for state constitutionalism in Pennsylvania. And yet, there was no history to support an independent meaning in *Edmunds*. So, it was an odd vehicle for beginning this process. The case that prompted *Edmunds* was *United States v. Leon*.[25] There, the U.S. Supreme Court created a "good-faith" exception to the exclusionary rule, permitting the government to introduce at trial any evidence obtained in violation of the Fourth Amendment if police had a "good faith" basis for believing their unconstitutional search was actually lawful.[26] Soon after, *Edmunds* presented the question of whether the Pennsylvania Constitution also permitted a good-faith exception. But this revealed a quandary. As Pennsylvania Supreme Court Chief Justice Thomas Saylor has explained, long before the U.S. Supreme Court carved out an exception to the exclusionary rule, the Pennsylvania Supreme Court had "consistently rejected" that its constitution contained any exclusionary rule at all.[27] So, "as a matter of state constitutional law," the exception *was* the rule in Pennsylvania. That meant there could not have been "relevant

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21 Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).

22 Thomas G. Saylor, *Fourth Amendment Departures and Sustainability in State Constitutionalism*, 22 WIDENER L.J. 1, 17 (2012). A prior case had "laid the foundation" for *Edmunds*. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decision*, 47 DUQ. L. REV. 503, 507 (2009). But that case also came after *Zettlemoyer*. *See* Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983). And as Judge Hardiman of the Third Circuit explained, "*Edmunds* was a watershed in state constitutional law because it articulated a standard for state courts to follow as they determined whether to interpret state constitutions differently than federal courts interpreted the United States Constitution." Hardiman, *supra* note 22, at 504. Indeed, it was "a sea change in Pennsylvania constitutional law," because it instituted "a four-part framework for courts to use in evaluating claims rising under the Pennsylvania Constitution." *Id.* at 509.

23 586 A.2d at 895.

24 *Id.*

25 468 U.S. 897 (1984).

26 *Id.* at 913, 922–23; *see also* Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 906 (1986) ("In *United States v. Leon*, the Supreme Court announces a 'good-faith exception' to the Fourth Amendment exclusionary rule for 'searches conducted pursuant to warrants.'" (footnote omitted) (quoting 468 U.S. at 924)).

27 Saylor, *supra* note 22, at 17.

history to support a broader state constitutional interpretation."[28] And yet, the court provided the provision with its own meaning anyway.

But whereas there was no history to support an independent meaning in *Edmunds*, the opposite is true for the case that rejected an independent meaning under Section 13. Although there is ample "relevant history to support a broader state constitutional interpretation" of the provision, the court rejected a challenge to the State's death penalty under Section 13 of the Commonwealth Constitution in *Commonwealth v. Zettlemoyer*.[29] "[T]he rights secured by the Pennsylvania prohibition against 'cruel punishments,'" it declared, "are co-extensive with those secured by the Eighth and Fourteenth Amendments."[30]

The *Zettlemoyer* court thus recognized that history is crucial to understanding Section 13, but it offered an incomplete account of the Comomonwealth's constitutional past. It surmised that because Pennsylvania law had originally tolerated the death penalty, the punishment could not be "cruel" now.[31] Yet looking only at the *actions* of Revolutionary Pennsylvanians overlooks how they *understood* their prohibition. That narrow view of history obscures the clause's original understanding, blinding the court from seeing that Section 13's meaning requires an evolving application of limited purposes for punishment. The Revolutionaries themselves did not think their application defined the Clause's content. The consequence is that the court began departing from federal precedent where there was no unique Pennsylvania history and has since refused such independent analysis where that historical evidence exists.

Weirder still, history is the very reason the court has not provided Section 13 with an independent meaning. It has repeatedly said that it will not depart from the Eighth Amendment *because* there is no unique Pennsylvania history to the "cruel" punishments provision. And for proof, it continues to cite *Zettlemoyer*'s incomplete reading of the past.[32]

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28 *Id.* at 18 (quoting Commonwealth v. Russo, 934 A.2d 1199, 1207 (Pa. 2007)).

29 454 A.2d 937 (Pa. 1982). The court has continued to adhere to this holding. *See, e.g.*, Commonwealth v. Bonner, 135 A.3d 592, 597 n.18 (Pa. Super. 2016) ("'The Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendment of the United States Constitution.' Therefore, we do not conduct a separate analysis of Appellant's state constitutional claim." (quoting Commonwealth v. Yasipour, 957 A.2d 734, 743 (Pa. Super. 2008), *appeal denied*, 980 A.2d 111 (2009)) (citation omitted)).

30 *Id.* at 967.

31 *Id.* at 967–68.

32 *See infra* section IV nn.338–41 (discussing subsequent cases that relied on *Zettlemoyer*'s historical account).

But part of the problem is explicable. In *Edmunds*, the court declared that every challenge under the state constitution must include an analysis of the relevant provision's history.[33] Only then did history become mandatory. But *Zettlemoyer* predated *Edmunds*. At that time, the past was not explicitly a part of the state constitutional present. So the court refuses to depart today because of a cursory historical account provided before litigants knew how much history counted. The result is backward: the history here should support departure, not suppress it. This essay provides that full history.

II. THE U.S. SUPREME COURT'S HISTORY OF THE EIGHTH AMENDMENT

The Supreme Court's view of the Eighth Amendment is narrow. It has declared that the provision "originally sought to prohibit only methods of punishment armed with a "(cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'"[34] That's all. This account[35] neither always controls the doctrine the Court applies nor the outcome of its cases.[36] And, indeed, its account

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33 Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

34 Bucklew v. Precythe, 138 S. Ct. 1112, 1124 (2019) (citing Baze v. Rees, 553 U.S. 35, 48 (2008)).

35 Some Justices have disputed the prevailing account—and have relied on Pennsylvania history in doing so. When Justice Thurgood Marshall, for instance, called for the abolition of capital punishment, he cited William Bradford's essay, discussed *infra* at note 58, for the proposition that "a penalty is unconstitutional whenever it is unnecessarily harsh or cruel." Furman v. Georgia, 408 U.S. 238, 332 (1972) (Marshall, J., concurring) (internal citations omitted). Bradford's account, argued Justice Marshall, was "what the Founders of this country intended." *Id.* It was "what their fellow citizens believed the Eighth Amendment provided." *Id.* And that Pennsylvania philosophy, he thought, shaped the origins of the Eighth Amendment:

> Even in the 17th century, there was some opposition to capital punishment in some of the colonies. In his 'Great Act' of 1682, William Penn prescribed death only for premeditated murder and treason, although his reform was not long lived.
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> In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons. These groups pressured for reform of all penal laws, including capital offenses. Dr. Benjamin Rush soon drafted America's first reasoned argument against capital punishment, entitled An Enquiry into the Effects of Public Punishments upon Criminals and upon Society. In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania." He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.

Id. at 335–36.

36 In some cases, the Court's "evolving standards of decency" doctrine controls. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (discussing the evolving standards implemented by the Court when performing an Eighth Amendment analysis).

may not be accurate.[37] But as history gains prominence in constitutional interpretation under the current Court,[38] so too will this (mis)interpretation.

Justice Antonin Scalia first offered this limited original meaning in 1991. That case, *Harmelin v. Michigan*,[39] upheld a mandatory sentence of life without the possibility of parole for the possession of 650 grams of cocaine.[40] Justice Scalia argued this original meaning traces back to England's 1689 Declaration of Rights, which prohibited "cruell and unusuall Punishments." And that guarantee, he argued, did not bar barbaric punishments, *per se*.[41]

The English prohibition, on which the Eighth Amendment was based, only prevented invented, or "arbitrary" punishments.[42] The English, argued Justice Scalia, based this proscription on the notorious punishment of an alleged perjurer, Titus Oates.[43] In that case, Judge George Jeffreys had departed from common and statutory law, pronouncing without precedent that Oates "should stand in the pillory annually at certain specified times and places" and be "whipped by 'the common hangman' 'from Aldgate to Newgate'" on May 20 and from "Newgate to Tyburn" on May 22.[44] The

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37 The potential inaccuracy of the historical account only bolsters the proposition that the Pennsylvania court should not lockstep: why should the court abide by Eighth Amendment rulings that emanate from inaccuracy? And because the Justices who have presented a countervailing narrative rely on Pennsylvania's history to do so, this question is even more acute: if the U.S. Supreme Court Justices who think the Court's history is wrong look to Pennsylvania's history to define the Eighth Amendment, then the Pennsylvania Supreme Court Justices certainly should not immediately follow the Eighth Amendment's history without conducting a review of Pennsylvania's.

38 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (implementing an originalist approach during a Second Amendment analysis); *see also* Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality (Feb. 6, 2023) (unpublished manuscript) (on file with author), https://ssrn.com/abstract=4347334 [https://perma.cc/648R-6235] ("The Justices of the Supreme Court are increasingly originalist.").

39 501 U.S. 957 (1991).

40 Justice Scalia wanted history to control the outcome in *Harmelin*. It did not. Only Chief Justice Rehnquist joined the bulk of Justice Scalia's history. The Court's majority, however, endorsed his conclusion regarding mandatory penalties based on that history:

> As our earlier discussion should make clear, this claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'

Id. at 994–95 (internal citations omitted). But that history has stuck.

41 *Id.* at 967–68.

42 *Id.*

43 *Id.* at 969–70.

44 *Id.* at 970.

Declaration of Rights, Scalia argued, incorporated a prohibition only against *these* sorts of punishments.

Those sorts of punishments were "unusual." "In all the[] contemporaneous discussions," surrounding the enactment of the Declaration of Rights, as well "as in the prologue of the Declaration," wrote Justice Scalia, "a punishment is not considered objectionable because it is disproportionate."[45] It is objectionable "because it is 'out of [the Judges'] Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'"[46]

And those two words—unusual and illegal—had identical meanings. So "[a] requirement that punishment not be 'unusuall,'" he argued, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition."[47] According "to its terms, then, by forbidding 'cruel *and unusual* punishments,' the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed."[48]

That meant, said Scalia, because of the text's "unusual" requirement, the prohibition proscribes only *methods* of punishment both cruel and contrary to long usage. Cruelty alone did not transgress the Clause's guarantee; the means of inflicting the punishment must also be unusual for the punishment to be impermissible.

And Scalia argued that the Framers intentionally adopted this English limitation to the American Amendment's reach. The Framers knew that, of the state constitutions, "two prohibited 'cruel' punishments, Pa. Const. Art. IX, § 13 (1790); S. C. Const. Art. IX, § 4 (1790). The new Federal Bill of Rights, however, tracked Virginia's prohibition of 'cruel *and* unusual punishments.'"[49] Likewise, "those who framed, proposed, and ratified the Bill of Rights" knew that "[p]roportionality provisions had been included in several State Constitutions," including Pennsylvania's first constitution of 1776. And yet, the Framers did not adopt one.[50] That meant the Framers

45 *Id.* at 973.

46 *Id.* at 973 (footnotes omitted).

47 *Id.* at 973–74 (footnotes omitted).

48 *Id.* at 976 (internal citation omitted).

49 *Id.* at 966.

50 *Id.* at 977 ("[P]unishments should be 'in general more proportionate to the crimes.'" (quoting PA. CONST., § 38 (1776))).

knew of guarantees that either (1) did not require a punishment to be "unusual," or that (2) explicitly guaranteed proportional punishments. But they instead chose a "cruel and unusual" proscription. And in so doing, Scalia said, they rejected the alternative options.

Justice Scalia also invoked the first criminal laws of the United States to corroborate his reading. "The actions of the First Congress, which are of course persuasive evidence of what the Constitution means," he wrote, "belie any doctrine of proportionality. Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code."[51] And that penal code permitted excessive punishments.

Lastly, Justice Scalia looked to state court decisions "[t]hroughout the 19th century." Without mentioning Pennsylvania, Justice Scalia adverted to decisions from Virginia, Massachusetts, New Mexico,[52] Georgia, Missouri, Kansas, Michigan, Indiana, Ohio, New York, South Dakota and California. Each, he argued, only addressed certain methods of punishing. Together, then, this evidence added up to Justice Scalia's succinct conclusion: although a long mandatory prison sentence "may be cruel," it "[was] not unusual in the constitutional sense."[53]

The Supreme Court's own account thus highlights the incompatability of the Federal and Pennsylvania guarantees. Justice Scalia believed that the Federal Framers deliberately chose to exclude a promise of proportional punishments because they knew about—and yet ignored—Pennsylvania's "[p]roportionality provisions." Likewise, Justice Scalia thought that several state court decisions substantiated his beliefs about the Eighth Amendment—but he did not cite a Pennsylvania case. And, most importantly, he argued that the U.S. Constitution does not concern itself with the severity of a punishment, specifically because the Eighth Amendment's adopted a textual "requirement" that is absent from the Pennsylvania Constitution: "that punishment not be 'unusual.'"[54] So by the Supreme Court's own logic, Section 13 cannot mean what the Eighth Amendment means. The Pennsylvania court thus adopts the meaning of the Eighth Amendment for its constitution, although the U.S. Supreme Court has effectively declared that the meaning of the Eighth Amendment hinges on its departure from the Pennsylvania Constitution.

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51 *Id.* at 980 (citations omitted).

52 The New Mexico case was from the Supreme Court of the *Territory* of New Mexico.

53 *Id.* at 994 (emphasis added).

54 *Id.* at 974.

And that Supreme Court account remains authoritative today. The Court recently echoed it, for instance, in *Bucklew v. Precythe*,[55] which permitted Missouri to apply its lethal injection protocol to Russell Bucklew, even though that method of punishment could have caused him to choke on his own blood.[56] The punishment was permissible despite the risk, said the Court, because the Eighth Amendment only originally prohibited "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) "'superadd[ition]'" of "'terror, pain, or disgrace.'"[57] On this reading, the clause looks to the past. It prohibits only the old. But lethal injection was a "technological innovation[]" of the present.[58] So no matter the risk, it could not meet the criteria set out by the Eighth Amendment's history.

III. SECTION 13'S HISTORY AND PENNSYLVANIA'S "PENAL REVOLUTION"

The U.S. Supreme Court's historical account of the Eighth Amendment is irreconcilable with the full genealogy of Section 13. The Supreme Court has said that the Framers looked to English history for the Eighth Amendment. But Revolutionary Pennsylvanians repudiated English criminal law's lineage and adopted Enlightenment theories instead. The English approach preached retribution as a justification for punishment. The Enlightenment thinkers, in contrast, permitted only deterrence and reformation. The Eighth Amendment, by requiring a punishment to be unusual, originally proscribed only *methods* of punishment inflicting the *superaddition of pain* beyond death. But Revolutionary Pennsylvanians—eschewing a textual requirement that a punishment be unusual—believed that anything *unnecessary* for achieving the limited purposes of punishment *was* the *superaddition* of cruelty. And whereas the Supreme Court says that the original understanding of the Eighth Amendment deemed only long-disused

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55 139 S. Ct. 1112 (2019).

56 Specifically, Justice Gorsuch relied on Justice Thomas's concurrence in Baze v. Reese, which relied on Justice Scalia's history in *Harmelin*. *See id.* at 1123 (citing 553 U.S. 35, 97 (2008) (discussing how "these methods had long fallen out of use and so had become 'unusual.'")); *see also* Baze v. Rees, 553 U.S. 35, 97 (Thomas, J., concurring) (citing 501 U.S. at 976) ("By the late 18th century, the more violent modes of execution had "dwindled away," *id.*, at 76, and would for that reason have been "unusual" in the sense that they were no longer "regularly or customarily employed.").

57 139 S. Ct. at 1124 (quoting 553 U.S. at 48; *accord id.* at 96 (Thomas, J., concurring)).

58 *Id.* The Court also highlighted that the innovation was meant to ameliorate the pain of execution. *Id.* But if it must also be long disused to be impermissible, it is hard to imagine how it could run afoul of the original meaning of the Eighth Amendment no matter its cruelty.

punishments as unconstitutional, Revolutionary Pennsylvanians originally understood their prohibition to evolve over time.

What Justice Scalia claims the Framer's originally understood the Eighth Amendment to mean is anathema to how Revolutionary Pennsylvanians' understood Section 13. In their own words: whereas Scalia said "[a] requirement that punishment not be 'unusuall' . . . was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition[,]"[59] Revolutionary Pennsylvanians who excluded a requirement of unusualness "perceive[d] . . . that the severity of the criminal law" they inherited from England was "an exotic plant and not the native growth of Pennsylvania,"[60] and so they prohibited all "[c]ruel and sanguinary punishments" especially those within the bounds of the common-law tradition.[61]

A. AN OVERVIEW OF PENNSYLVANIA'S PENAL REFORM

Pennsylvania led the country, and indeed the world, in turning Enlightenment theories of punishment into legal guarantees, passing a series of early reform efforts that included Section 13 of the 1790 constitution. This revolution began after the Revolution.

In 1776, the Commonwealth's first constitution instructed the Legislature to make three changes. It mandated proportional punishments. It demanded "less sanguinary"—that is, less "cruel; bloody; and mur[d]erous"[62]—ones. And it ordered the Legislature "to make sanguinary punishments less necessary."[63] The independent Commonwealth's second chief justice urged the Legislature to fulfil these constitutional demands by

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59 501 U.S. 957 at 973–74 (footnotes omitted).

60 WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 20 (T. Dobson, 1793).

61 Jared Ingersoll, *Report: Made by Jared Ingersoll. Esq. Attorney General of Pa., in compliance with a resolution of the legislature, passed the 3d of Mar., 1812, relative to the penal code. Communicated to the legislature, Jan. 21, 1813*, 1 J. OF JURIS: A NEW SERIES OF THE AM. L.J. 1, 325 (John E. Hall ed. 1821).

62 *See* ROBERT JAMES TURNBULL, A VISIT TO THE PHILADELPHIA PRISON 6 (J. Phillips & Son, 1797).

63 PA. CONST., § 39 (1776). *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755), https://johnsonsdictionaryonline.com/1755/sanguinary_adj (last visited Jan. 1, 2022) (defining sanguinary); *see also* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH Language 722 (1830) (defining sanguinary as "1. Bloody; attended with much bloodshed; murderous. 2. Blood-thirsty; cruel; eager to shed blood").

implementing the most lenient means of achieving punishment's aims: deterrence.[64]

The Legislature responded by beginning to overhaul its penal code. In 1786, the Legislature passed a law that limited capital punishment to four crimes; but it also instituted public punishments. That method of punishment failed to live up to the ideals that inspired it.[65] Realizing this, the Legislature passed another law, superseding that earlier attempt.

The second bill, from 1790, replaced the public punishments that the first bill implemented with the nation's first penitentiary. That law's preamble explained that it was "for the purpose of carrying the provisions of the constitution [of 1776] into effect," noting that the previous measures had "failed of success" and "hop[ing]" that, "as far as it can be effected," the bill "w[ould] contribute as much to reform as to deter."[66]

That same year, the Commonwealth adopted a new constitution, distilling the 1776 constitutional mandate to the Legislature into an individual right for the judiciary to enforce. This was the prohibition on "cruel punishments" in the 1790 constitution.

Applying that constitutional principle, the Legislature adopted a further reform in 1794 that restricted capital punishment to first degree murder—the first law among the new states to do so, and the first to divide murders into degrees.[67] And, since "the actions" of such early legislatures, "are of course persuasive evidence of what the Constitution means,"[68] the law's preamble confirms that Pennsylvanians believed it is "the duty of every

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64 *See* Justices of the Pennsylvania Supreme Court and Grand Jury, Representation to the Pennsylvania General Assembly, PA. PACKET, Sept. 14, 1785, at 3 (suggesting to the General Assembly that the penal laws be reformed and replaced with manual labor because they had lost their efficacy).

65 *See* Hearing on Mar. 9, Pa. Gen. Assembly (1789), *reprinted in* MINUTES OF THE THIRTEENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, IN THEIR SECOND SESSION, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY, THE THIRD DAY OF FEB., . . . ONE THOUSAND SEVEN HUNDRED AND EIGHTY-NINE, at 132 ("And whereas the present mode of employing felons convict is on experience found to be highly pernicious to society, and to answer but . . . if any, of the good purposes intended by the existing law . . . .").

66 ACT OF 5TH APR. 1790, *reprinted in* JOHN W. PURDON, DIGEST OF THE LAWS OF PENNSYLVANIA 9 (M'Carty & Davis, 1831).

67 *See* David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861,* 63 AM. HIST. REV. 23, 26–27 (1957) (explaining that the Pennsylvania Legislature reduced the number of cases eligible for the death penalty by dividing the crime of murder into two degrees in the 1794 reform, setting an example for other states to follow); Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 770–73 (1949) (listing the language of the 1794 reform and explaining its legislative history).

68 Harmelin v. Michigan, 501 U.S. 957, 980 (1991) (citations omitted).

government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety."[69]

This philosophy of punishment propelled each change. As Thomas Mifflin, the state's first governor and chairman of the 1790 Constitutional Convention told the Legislature in 1792, "every punishment, which is not absolutely necessary for [deterrence], is an act of tyranny and cruelty."[70]

B. PENNSYLVANIA'S INFLUENCES: THE ENLIGHTENMENT THEORISTS[71]

Understanding Pennsylvania's early history requires first understanding the teachings of Enlightenment thinkers. In particular, the writings of French philosopher Baron de Montesquieu and Italian criminologist Cesare Beccaria shaped political thought in Pennsylvania both before and after Independence.

(1) Montesquieu —— In 1748, Montesquieu outlined his theory of punishment in *The Spirit of the Laws*. He explained that deterrence depends more on the certainty of criminal sanction than its severity.[72] "[P]enalties," said Montesquieu, "have decreased or increased in proportion as one has approached or departed from liberty."[73] Where liberty resides, "a good legislator will insist less on punishing crimes than on preventing them; he will apply himself more to giving mores than [to] inflicting punishments."[74] For "shame, and fear of blame are motives that serve as restraint[]" more successfully than the threat of serious sanction.[75] So "[t]he greatest penalty for a bad action will be to be convicted of it."[76]

To Montesquieu, severity was in fact counterproductive. "[I]mmoderate penalties would certainly terrify men's spirits," and "as a result, no one could be found to accuse or condemn whereas, with moderate penalties, there

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69 ACT OF 22ND APR. 1794, *reprinted in* PURDON, *supra* note 66, at 647.

70 S. JOURNAL, 17th Assemb. 14 (Pa. 1792).

71 This section draws from my MPhil in Political Thought and Intellectual History at the University of Cambridge. *See generally* Kevin Bendesky, Why the American Constitution Could Prohibit Capital Punishment Now (2020) (MPhil, University of Cambridge) (on file with author) (arguing that Pennsylvania played a prominent role in the understanding of punishment in the United States, by propounding a principle that these punishments must be justified by necessity).

72 MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. and eds., Cambridge Univ. Press 20th ed. 2015) (1748).

73 *Id.* at 82.

74 *Id.*

75 *Id.*

76 *Id.*

would be both judges and accusers."[77] This is why "atrocity in the laws prevents their execution."[78] And "[i]f we enquire into the cause of all human corruptions," he believed, "we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments."[79] Severity undermined the point of punishment: prevention.

And severity led to barbarity. When "[s]ome defect is felt in a state," Montesquieu argued, then "[a] violent government wants to correct it instantly; and, instead of considering that the old laws should be executed, one establishes a cruel penalty that checks the ill then and there."[80] In other words, severity begets more ineffective severity.[81] Citizens of such a state "can be guided only by a greater atrocity."[82] They become "accustomed to despotism."[83] So "[e]very penalty that does not derive from necessity is tyrannical."[84]

(2) Cesare Beccaria —— Beccaria's 1764 treatise, *On Crimes and Punishments*,[85] addressed the Roman Code of Continental Europe, but it

77 *Id.* at 88.

78 *Id.*

79 This is not the translation from the Cambridge Texts in Political Thought, which this paper uses for all other Montesquieu quotations. This is because Beccaria and many of the Pennsylvania reformers used the above translation when they cited this passage. And they cited it often. And so, I also use it here to demonstrate its influence on subsequent theorists. The page cited is the one from the Cambridge Text translation, which reads "[i]f one examines the cause of every instance of laxity, one will see that it is unpunished crimes and not moderated penalties." *Id.* at 85.

80 *Id.* at 84.

81 *Id.* ("But the spring of government wears down; the imagination becomes inured to this heavier penalty as it had to the lesser, and as fear of the lesser penalty diminishes, one is soon forced to establish the heavier in every case.").

82 *Id.* at 87.

83 *Id.* at 85.

84 *Id.* at 316.

85 CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764), *reprinted in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (Richard Bellamy ed., Richard Davies, Virginia Cox & Richard Bellamy trans., Cambridge Univ. Press, 1995).

might have had its greatest influence in America.[86] Pennsylvanians particularly revered his work and instituted their penal reforms in his name.[87]

Beccaria grounded his philosophy of punishment in social-contract theory. Men in nature were free, but perpetually at war.[88] To form society, they sacrifice the smallest share of their liberty that would guarantee safety.[89] Sovereignty is the amalgamation of those sacrificed liberties.[90] Punishments derive from "the necessity of defending the repository of the public well-being from the usurpations of individuals."[91] Crimes are thus harms to society, not to individuals, and the purpose of punishments was to deter these societally harmful usurpations.[92] But punishments are, by their nature, an evil. Quoting "the great Montesquieu," Beccaria therefore argued that "[e]very punishment which is not derived from absolute necessity is tyrannous."[93]

Limiting punishments to necessity was the foundational principle of his work. "Necessity alone," he wrote, "from the confrontation of emotions and the opposition of interests, has given rise to the idea of *common utility*, which is the foundation of human justice."[94] But the production of good was insufficient justification: "a punishment," he qualified, "is just not simply because it produces some good, but because it is necessary."[95] And, "a punishment which exceeds the limit laid down by law"—a punishment which exceeds the limit of necessity—"is the just punishment with another punishment *superadded*."[96] Beccaria therefore believed a cruel "supperaddition" was not, as the contemporary U.S. Supreme Court argues,

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86 *See, e.g.*, H.L.A. Hart, *Bentham and Beccaria*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 40 (1982) (describing Beccaria's influence on Jeremey Bentham); John D. Bessler, *The Marquis Beccaria: An Italian penal reformer's meteoric rise in the British Isles in the transatlantic Republic of Letters,* 4 DICIOTTESIMO SECOLO 107 (2019) (discussing the highly influential role of Becarria's work on constitutions and penal codes); Hugh Dunthorne, *Beccaria and Britain*, in CRIME, PROTEST AND POLICE IN MODERN BRITISH SOCIETY (David W. Howell & Kenneth O. Morgan eds., 1999) (describing the surprising popularity of Beccaria's writing around the world and particularly in Britain); MARCELLO T. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW (1942) (summarizing Beccaria's work and its impact); MARCELLO MAESTRO, CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 3, 136–37 (1973) (describing Beccaria's influence across America and Europe and their leaders, including Maria Theresa and John Adams).

87 *See infra* Sections III.A–E (discussing Section 13's History and Pennsylvania's "Penal Revolution").

88 BECCARIA, *supra* note 85, at 10–11.

89 *Id.*

90 *Id.*

91 BECCARIA, *supra* note 85, at 10.

92 On the harm to society, *see id.* at 19, 22, 40; on deterrence, *see id.* at 44.

93 *Id.* at 10.

94 *Id.* at 22 (emphasis in original).

95 *Id.* at 58.

96 *Id.* at 12 (emphasis added).

excessive terror or disgrace added beyond death. It was rather any severity added beyond necessity.

This theory blended priorities of humanity and efficiency. Because cruelty is anything beyond necessity, and the purpose of punishment was deterrence, legitimate punishment was limited to the most lenient means that deterred.[97] Like Montesquieu, Beccaria believed that a punishment's certainty, rather than its severity, deterred crime. He also called for proportionality—but only insofar as a proportionate punishment was necessary. Even a proportionate penalty was cruel, he believed, if a less severe one would deter as effectively.

Beccaria also specifically opposed capital punishment. He believed that the duration of a punishment, more so than its severity, contributed to its deterrent effect. "It is not the intensity," he said, "but the extent of a punishment which makes the greatest impression on the human soul."[98] Because the memory of the instant infliction of death was short, the death penalty required successive inflictions to ensure it remained on the minds of citizens.[99] The punishment therefore required the crimes it punished, serving as a "cruel example,"[100] and undermining the legitimacy of the law. "Ah!," subjects would declare, "these laws are nothing but pretext[] for power and for the calculated and cruel formalities of justice."[101] Capital punishment was therefore unnecessary and cruel.

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Built on the foundation of these theorists, Pennsylvania's penal laws after Independence were a rupture from English punishment's past. These philosophies had existed in writing, but no state had implemented them. At the time, England punished hundreds of crimes with death because the reigning ideology was that severity was the greatest antidote to lawbreaking and retribution a justifiable penological aim.[102] But Pennsylvanians broke with this inheritence. They instead embraced Enlightenment theories, producing a profound change in penal thought.

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97 *See* BECCARIA, *supra* note 85, at 44 (arguing that the sole purpose of punishment is discouraging others from perpetrating the crime).

98 *Id.* at 67.

99 *See id.* (highlighting benefits of deprivation of liberty over death penalty).

100 *Id.* at 70.

101 *Id.* (emphasis omitted).

102 *See* 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 3–35 (1948) (discussing English penal laws in the late 1700s and early 1800s).

C. PENNSYLVANIA'S FRAMERS & THEIR ORIGINAL UNDERSTANDING OF "CRUEL"[103]

The Pennsylvanians who shaped the State's first penal laws drew from these thinkers. In pamphlets, debates, articles, speeches, and lectures, they explained that only deterrence and reformation justified inflicting a punishment and that necessity girded these aims. Anything beyond that was cruel.[104] Their writings explicate the *meaning* of cruelty—and thus the constitutional provision they wrote.[105] Their conclusion that capital punishment might still be necessary was not a repudiation of, but remained in line with, Beccaria's philosophy. The Italian believed that capital punishment was entirely cruel because it was unnecessary; Pennsylvanians were simply less certain that the punishment was not necessary: but both believed the punishment could only be inflicted if it were necessary.

Nor did they focus on capital punishment exclusively. Because the death penalty was the reigning punishment for most crimes at the time, these Pennsylvanians' comments focused on the infliction of death. But just as the Commonwealth's Founders scrapped their system of public punishments because it failed to embody the ideals inspiring it, so too every mode of punishment in Pennsylvania must adhere to this animating ideology. Put otherwise, the Founding thinkers' focus was on eradicating capital punishment; but the principles they espoused remain universal. This is especially true because they believed that the concept of necessity (and thus cruelty) is an evolving one, defined not by its specific application in the 1790s but by developing moral and empirical understanding.

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103 This section draws from my thesis as well. *See generally* Bendesky, *supra* note 71.

104 It is worth noting at the outset that Stuart Banner has explained how "in the seventeenth and eighteenth centuries" the death penalty "was also understood . . . to facilitate the criminal's repentance" by specifically delineating the number of days he had alive and thereby limiting the number of days he had to seek penitence. STUART BANNER, THE DEATH PENALTY 16–22 (2002) (explaining the procedures before a defendant in England was put to death). This, however, was not the idea of rehabilitation and reformation the Pennsylvanians had in mind, as the evidence presented below demonstrates.

105 The question of constitutional *meaning* should be distinguished from the question of *whom* the authors thought enforced that meaning—i.e., the legislature or the courts. *See infra* note 340 and accompanying text. It's necessary to distinguish the questions for at least the following two reasons. *First*, the *Edmunds* inquiry today looks at the history and meaning of the text, not the separate question of its enforcement. The court's *Edmunds* doctrine establishes the enforcement mechanism itself.

Second, who should enforce the text is contextual in this story—in 1776 the constitutional text specifically instructed the Legislature to act. That changed in 1790. After that, the mandate was an individual right that was judicially enforceable.

(1) William Bradford —— William Bradford served as both the Attorney General and a Supreme Court Justice of the Commonwealth. In the former position, he attended the 1790 Constitutional Convention.[106] Not long after, he became the second Attorney General of the United States, appointed by George Washington.

Bradford was also the author of Pennsylvania's criminal law reform. "Mr. Bradford," a friend wrote to the *Philadelphia Inquirer* upon Bradford's death, "was the source and fountain, the father of the reformation of the penal code of Pennsylvania."[107] Supreme Court of Pennsylvania Justice Thomas Duncan agreed, writing from the bench that Bradford was the "author of our humane penal code."[108]

Bradford's own work as a judge inspired his views. "We had occasion to try, this day, a man on a charge of Arson, or Malicious burning," he wrote his wife in May of 1793.[109] "The proof would have reached him," he continued, "had the penalty been less: but the punishment of death, drove the jury into a speedy acquittal."[110] Just as Montesquieu and Beccaria had argued, Bradford too was becoming "more and more persuaded that this severity, is a mere scarecrow, — & that as it will scarcely ever be inflicted, it will tend to produce crimes instead of suppressing them."[111] These views colored the principles that he would later instill in Pennsylvania's criminal code.

Bradford also came to believe that only punishments required for deterrence were permissible. He made this clear in a 1793 essay on the necessity of capital punishment. Its title page quoted Montesquieu: "[i]f we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of

106 *See* Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789–90*, 59 PA. HIST. J. MID-ATL. STUD. 122, 129–31 (1992) (noting William Bradford's contributions to the 1790 Constitutional Convention).

107 Personal Sketches, William Bradford to the Editor of the Inquirer, *in* THE WALLACE COLLECTION, HIST. SOC'Y OF PA., Mar. 4, 1846 (eulogizing Bradford after his death); *see also* PHILA. SOC'Y FOR ALLEVIATING THE MISERIES OF PUB. PRISONS, A STATISTICAL VIEW OF THE OPERATION OF THE PENAL CODE OF PENNSYLVANIA: TO WHICH IS ADDED, A VIEW OF THE PRESENT STATE OF THE PENITENTIARY AND PRISON IN THE CITY OF PHILADELPHIA 4 (1817) ("William Bradford. . . a gentleman eminently distinguished by his active benevolence, and the dignity and splendor of his public character. The present penal code was chiefly composed by that gentleman, and it will ever remain a monument of his knowledge, and love of human uature [sic].").

108 James v. Commonwealth, 12 Serg. & Rawle 220, 231 (Pa. 1825).

109 Letter from William Bradford to Susan Bradford (May 21, 1793), *in* WALLACE COLLECTION, VOLUME II, 76.

110 *Id.*

111 *Id.*

punishments."[112] Bradford explained that "Montesquieu and Beccaria led the way in the discussion."[113] And he began with two "principles . . . so important that they deserve a place among the *fundamental* laws of every free country:"[114] one, that "*[t]he prevention of crimes is the soel end of punishments*;"[115] and two, that "*every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act.*"[116]

Bradford stated that the Pennsylvania Constitution incorporated this conception of cruelty. He declared that "[f]ew of the American Constitutions are sufficiently express, though they are not silent, on this" principle that only necessity justified a punishment.[117] Many constitutions, including the 1776 Pennsylvania Document, instead proscribe sanguinary punishments.[118] And still "other constitutions," such as Pennsylvania's second constitution, "content themselves with generally declaring, '[t]hat cruel punishments ought not to be inflicted.'"[119] But, he asserted, "does not this involve the same principle, and implicitly prohibit every penalty which is not evidently necessary?"[120]

He declared the necessity principle an "important truth[]."[121] In particular, he called "the infliction of death, the highest act of power that man exercised over man."[122] And so it should "never be prescribed where its necessity was doubtful."[123] If a gentler "penalty short of death" worked as effectively, declared Bradford, then "to take away life in such case, seems to be an [unauthorized] act of power."[124]

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112 BRADFORD, *supra* note 60.

113 *Id.* at 3 (emphasis omitted).

114 *Id.* at 4 (emphasis in original).

115 *Id.*

116 *Id.* at 3 (emphasis in original).

117 *Id.* at 4.

118 *Id.*

119 *Id.*

120 *Id.* at 4–5.

121 *Id.* at 5.

122 *Id.*

123 S. JOURNAL, 17th Assemb. 40 (Pa. 1792).

124 BRADFORD, *supra* note 60, at 6–7. In this publication, there is a typo. It says an "authorized" act of power. However, the version placed in the Pennsylvania Senate's legislative journal says "unauthorized." S. JOURNAL, 17th Assemb. 41 (Pa. 1792). Because the entire thrust of the argument is that any unnecessary penalty is cruel, in addition to the original spelling, it seems more than reasonable to conclude that this latter version was a typo.

He also believed that human knowledge evolved—and therefore so too must the law. Quoting the final words of Beccaria's essay in a letter to a friend,[125] Bradford declared that after the 1786 measure passed:

> [t]hen a happy new era will *begin*, and I dare hope that, instructed by experience, Pennsylvania will persevere in these ideas until that point of perfection is approached, at which every punishment will be public, immediate, and mandatory, the smallest possible in the given instance, proportionate to the crime, and determined by the laws.[126]

He also highlighted that that this principle has no end point and applied to each method of punishment. "It is possible," wrote Bradford in 1793, "that the further diffusion of knowledge and melioration of manners, may render capital punishments unnecessary in all cases."[127] Still, he said, "until we have had more experience, it is safest to tread with caution on such delicate ground, and to proceed step by step in so great a work."[128]

And he concluded the text with a commitment to the evolution of social amelioration rendering capital punishment unnecessary in the future—highlighted by the imagery of Pennsylvania's keystone:

> The conclusion to which we are led, by this enquiry, seems to be, that in all cases (except those of high treason and murder) the punishment of death may be safely abolished, and milder penalties advantageously introduced——Such a system of punishments, aided and enforced in the manner I have mentioned, will not only have an auspicious influence on the character, morals, and happiness of the people, but may hasten the period, when, in the progress of civilization, the punishment of death shall cease to be necessary; and the Legislature of Pennsylvania, putting the Key-stone to the arch, may triumph in the *completion* of their benevolent work.[129]

(2) James Wilson —— Wilson, signatory of the Declaration of Independence and the Constitution, "must be regarded as the father of the constitution in Pennsylvania."[130] He was a delegate to the State Constitutional Convention of 1776 and a member of the Legislature thereafter.[131] Then, "[i]n 1779 he was one of the active members of the

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125 They are the final words, italicized in Beccaria's text. BRADFORD, *supra* note 60, at 113 ("*[I]t is existential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law*." (emphasis in original)).

126 Letter from William Bradford to Luigi Castiglioni, *quoted in* LUIGI CASTIGLIONI'S VIAGGIO: TRAVELS IN THE UNITED STATES OF NORTH AMERICA 313–14 (Antonio Pace ed., Antonio Pace trans., Syracuse Univ. Press, 1983) (1785–87) (emphasis omitted) [hereinafter Pace].

127 BRADFORD, *supra* note 60, at 36.

128 *Id.*

129 *Id.* at 46.

130 PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 699 (John Bach McMaster & Frederick D. Stone eds., 1888).

131 *Id.* at 757–58.

Republican Society formed for the purpose of urging the revision of the State constitution of 1776."[132] After that, George Washington appointed him as one of the original United States Supreme Court Justices. In that position, he attended the Pennsylvania Constitutional Convention of 1790.[133]

Wilson's understanding of punishment flowed from the theories of Montesquieu and Beccaria. "The theory of criminal law," he wrote, "has not, till lately, been a subject of much attention or investigation. The Marquis of Beccaria led the way. His performance derives much importance from the sentiments and principles, which it contains[.]"[134] Wilson likewise relied on the French philosopher whom he repeatedly called the "celebrated Montesquieu."[135]

Wilson believed that criminal laws were the bedrock of liberty when they were lenient and proportionate to crimes. "It is on the excellence of the criminal laws, says the celebrated Montesquieu, that the liberty of the citizens principally depends."[136] Specifically, "'[l]iberty,' says the celebrated Montesquieu, 'is in its highest perfection, when criminal laws derive each punishment from the particular nature of the crime.'"[137] And quoting the "Marquis of Beccaria," Wilson "therefore" concluded that "'there ought to be a fixed proportion between punishments and crimes."[138]

He believed that the purpose of punishment was prevention. Like Beccaria, he argued that society had usurped the private right to punishment.[139] Crimes in society were injuries to the public.[140] Thus "prevent[ing] crimes," he thought, "is the noblest end and aim of criminal

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132 *Id.* at 758.

133 *Id.*

134 3 JAMES WILSON, LECTURES ON LAW (1790), *reprinted in* THE WORKS OF THE HONOURABLE JAMES WILSON 13 (Bird Wilson ed., 1804) [hereinafter LECTURES ON LAW 3].

135 2 JAMES WILSON, LECTURES ON LAW (1790), *reprinted in* THE WORKS OF THE HONOURABLE JAMES WILSON 470–71 (Bird Wilson ed., 1804) [hereinafter LECTURES ON LAW 2].

136 3 JAMES WILSON, A CHARGE TO THE GRAND JURY IN THE CIRCUIT COURT FOR THE DISTRICT OF VIRGINIA 391 (1791), *reprinted in* THE WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) [hereinafter CHARGE TO THE GRAND JURY]; *see also* LECTURES ON LAW 3, *supra* note 134, at 15 ("[O]n the excellence of the criminal law, the liberty and the happiness of the people chiefly depend.").

137 LECTURES ON LAW 2, *supra* note 135, at 32.

138 LECTURES ON LAW 3, *supra* note 134, at 44.

139 *See id.* at 7; *see also* 1 JAMES WILSON, LECTURES ON LAW (1790), *reprinted in* THE WORKS OF THE HONOURABLE JAMES WILSON 294 (Bird Wilson ed., 1804) [hereinafter LECTURES ON LAW 1] ("To punish, and, by punishing, to prevent them, is or ought to be the great end of that [criminal] law, as shall also be particularly shown.").

140 LECTURES ON LAW 3, *supra* note 134, at 4 (claiming that "[a] crime is an injury . . . so dangerous" that "it affects . . . the security of the publick.").

jurisprudence."[141] And "[t]o punish them" was "one of the means necessary for the accomplishment of this noble end and aim."[142]

Leniency, thought Wilson, should prevail whenever possible. "Above all," he told a Grand Jury in Virginia, "let the wisdom, the purity, and the benignity of the civil code supersede, for they are well calculated to supersede, the severity of criminal legislation. Let the law diffuse peace and happiness; and innocence will walk in their train."[143]

In fact, he found excessive severity counterproductive. "[S]anguinary laws" were "dangerous" because they "corrupted, and when corruption arises from the laws the evil may well be pronounced to be incurable; for it proceeds from the very source, from which the remedy should flow."[144] Accordingly, "[p]unishments ought unquestionably to be moderate and mild," not only because severity is "inconsistent . . . with . . . [a] wise and good government,"[145] but because it is self-defeating: "[t]he criminal will, probably, be dismissed without prosecution, by those whom he has injured," which means that "the acerbity of punishment deadens the execution of the law."[146]

He thus believed in the preventative efficacy of "moderation," "speediness," and "certainty," rather than sanguinary punishments.[147] But punishments were an evil and were therefore "the infliction of that evil . . . which the crime . . . renders necessary, for the purposes of a wise and good administration of government."[148]

So Wilson believed only that which was necessary for prevention was permissible. "It must be admitted," he thought, "that [punishments] are a burthen and a yoke: they should resemble that yoke which is easy, and that burthen which is light."[149] For, "[i]f a law is even harmless[,] the very circumstance of its being a law, is itself a harm."[150] In this way, "[i]n a free state, the law should impose no restraint upon the will of the citizen, but such as will be productive of advantage, publick or private, sufficient to

141 LECTURES ON LAW 2, *supra* note 135, at 193.

142 *Id.*

143 CHARGE TO THE GRAND JURY, *supra* note 136, at 392.

144 *Id.* at 390.

145 LECTURES ON LAW 3, *supra* note 134, at 32.

146 *Id.* at 33.

147 CHARGE TO THE GRAND JURY, *supra* note 136, at 357–59 (1791) (explaining the "three qualities" of preventative efficacy).

148 LECTURES ON LAW 3, *supra* note 134, at 4.

149 LECTURES ON LAW 2, *supra* note 135, at 443.

150 *Id.* (alteration in original).

overbalance the disadvantages of the restraint."[151] That is, a justifiable punishment was one which produced the advantage of deterrence by the lightest burden possible.

Unnecessary severity, Wilson believed, was cruel. Whereas "moderate and mild" punishments lead to the efficient and effective administration of "publick justice," the opposite occurs with unnecessary severity. When the state establishes "excesses of . . . rigorous penalties," then "one degree of severity opens and smooths the way for another, till, at length, under the specious appearance of necessary justice, a system of cruelty is established by law."[152]

This all applied to capital punishment. "It is the opinion of some writers, highly respected for their good sense, as well as for their humanity," Wilson presumably wrote of Beccaria, "that capital punishments are, in no case, necessary."[153] And the belief "that nothing but the most absolute necessity can authorize them," was, said Wilson, "an opinion, which I am certainly well warranted in offering."[154]

Finally, Wilson knew that Pennsylvania had broken from English tradition, but its adherence to an evolving standard of necessity left its work perpetually unfinished. In "many . . . subjects" of criminal law, "Pennsylvania preceded England in point of liberal and enlightened improvements."[155] But "[o]ur progress in virtue," he explained, "should certainly bear a just proportion to our progress in knowledge."[156] And that progress was ongoing.

So too was society's moral evolution. "Morals," he explained, "are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are."[157] And "[t]his power of moral abstraction," said Wilson, "should be exercised and cultivated with the highest degree of attention," for "[i]t [is] as necessary to the progress of exalted virtue, as the power of intellectual abstraction is to the progress [of] extensive knowledge."[158]

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151 *Id.* at 442–43.

152 LECTURES ON LAW 3, *supra* note 134, at 359–60.

153 *Id.* at 384.

154 *Id.*

155 *Id.* at 171.

156 LECTURES ON LAW 1, *supra* note 139, at 143.

157 LECTURES ON LAW 3, *supra* note 134, at 143.

158 *Id.* at 171.

These principles entailed changed understandings of the law. "In every period of his existence," Wilson pronounced, "the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary [sic] degree, but will be calculated to produce, in future, a still higher degree of perfection."[159]

(3) Thomas McKean —— Thomas McKean led both the executive and judicial branches of Pennsylvania's government. He had been a delegate to the Continental Congress and signatory of the Declaration of Independence, as well a member of the Pennsylvania Convention that ratified the federal Constitution.[160] He was likewise "[c]hosen as chair of" the 1790 Pennsylvania Constitutional Convention.[161] He served as the second governor of the Commonwealth. And before that, he was the state's first Chief Justice.

McKean was also integral to the development of Pennsylvania's criminal law. He said that it was imperative for Americans to break from their English inheritance.[162] As his biographer writes, "[p]enal reform was a life-long interest."[163] McKean believed that "a wise and frugal government is more bent upon preventing than punishing crime."[164]

He publicly elaborated on the underpinnings of that philosophy. When the General Assembly had failed to heed the mandate of the 1776 Constitution, which directed the Legislature to make punishments less sanguinary and more proportional, McKean and "the Justices of the Supreme Court," including George Bryan, who served as Governor during the Revolutionary era, drafted a "Representation" to the Assembly.[165] It was "with concern," said the Justices, that they had "observed, that the punishments directed by the laws now in force, for felonies, as well as other atrocious and infamous offences, less than capital, . . . have lost much of their efficacy, and do not answer the principal views of society in inflicting them."[166] These principal aims of punishment were "to correct and reform

159 *Id.* at 143.

160 G. S. Rowe, *McKean, Thomas (1734–1817), Statesman, Jurist, and Signer of the Declaration of Independence*, AM. NAT'L BIOGRAPHY (Feb. 2000). He, in fact, "stepped down" to advocate more "aggressively." *Id.*

161 *Id.*

162 G.S. ROWE, THOMAS MCKEAN, THE SHAPING OF AN AMERICAN REPUBLICANISM 234–35 (1978).

163 G.S. Rowe, Power, Politics, and Public Service: The Life of Thomas McKean, 1734–1817, at 388 (1969) (Ph.D. dissertation, Stanford University) (ProQuest).

164 Rowe, *supra* note 160, at 235.

165 PA. PACKET, Sept. 14, 1785, at 3.

166 *Id.*

the offender, and to produce such strong impressions on the minds of others as to deter them from committing the like offence."[167] McKean thus concluded that, because "the end of all human punishments under regular government, being the security of society from the mischiefs of repeated wrongs and injuries, (not the atonement or expiation of guilt)," therefore, "if this great design could be attained by certain but milder punishments, great advantage and honor would be thereby derived to the commonwealth."[168] That is, the Justices, led by McKean, explicitly rejected retribution as a justification for punishment. And they argued against unnecessary severity.

(4) George Clymer —— George Clymer was a delegate to the Continental Congress and a signatory of both the Declaration and the Constitution.[169] During ratification, "he bore a conspicuous part, and when the constitution was submitted to the States it was he who, in the assembly, moved the calling of a convention for its consideration, thus securing the early support of Pennsylvania . . . ."[170] He was a member of the State Assembly as well.[171]

In that duty, Clymer labored to evolve the Commonwealth's criminal laws. He played a crucial role in enacting the statute that abolished public punishments, writing the House committee report of 1789 for repealing the 1786 bill.[172] That bill created the penitentiary. And so, he was called the "father of the salutary penitentiary system now in full force at Cherry Hill near the city of Philadelphia—solitary confinement and labor."[173]

Clymer's public pronouncements articulated his theories and motivations. After repealing public punishments, Pennsylvanians debated returning to capital punishments. Clymer reminded an adversary that doing so "would give concern to every man of humanity to be obliged to go back to our former mode of punishing crimes by death, while more lenient

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167 *Id.*

168 *Id.*

169 1 John Hopkinson, *Notice of Mr. Clymer—for the Port Folio*, THE PORT FOLIO, 375 (1813).

170 PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, *supra* note 130, at 705–06.

171 CHARLES AUGUSTUS GOODRICH, LIVES OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 288 (1829). For information on Clymer's role in securing the Federal Constitution, *see* ROBERT BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776–1790 194–202 (1971); Douglas Arnold McNeil, Political Ideology and the Internal Revolution in Pennsylvania (University of Michigan Dissertation Services, 2001).

172 JOHN SANDERSON, BIOGRAPHY OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 202 (1823). Multiple sources attest to the fact that Clymer was the author of this report. *See* Walter H. Mohr, *George Clymer*, 5 PA. HIST.: A J. OF MID-ATL. STUD. 282, 283 (1938).

173 L. CARROLL JUDSON, THE SAGES AND HEROES OF THE AMERICAN REVOLUTION 84 (1854); GOODRICH, *supra* note 171, at 196.

measures can be attended with equal success."[174] And, since Clymer "la[id] it down as a certain truth, that when a criminal is to be punished for an offence, it is with a view of deterring others," then if the same level of deterrence can be achieved by a lighter sentence, anything more sanguinary is unnecessary.[175] And he opposed it on this ground.[176] Only the gentlest means of achieving punishment's permissible ends was tolerable.

(5) Jared Ingersoll —— Jared Ingersoll was a prominent Pennsylvania lawyer who was the Commonwealth's Attorney General from the first year of the 1790 constitution to 1799. He was also solicitor of the city of Philadelphia from 1798 until 1801 before becoming U.S. District Attorney for the State. He returned as Attorney General in 1811. And a decade later, he became presiding judge of the District Court.[177]

Ingersoll also served as the quasi-official historian of the penal revolution. In 1812, the Legislature passed "a resolution '[r]equiring the Governor to request the attorney general, to draft a bill consolidating the penal code.'"[178] Because he was the Attorney General at the time, the task fell to Ingersoll. His efforts culimated in a report to the Legislature.

And his report quickly became authoritative across the branches of government. On January 21, the Secretary of the Commonwealth "presented a message from the Governor" to the Assembly, containing "the result of the labours of Jared Ingersoll, esq."[179] The report was then read.[180] At the end of that year, the Governor once more spoke to the Legislature

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174 PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 154 (Daniel Humphreys ed., 1788) (emphasis added). A biographer soon after his death noted that Clymer believed "[m]axims of jurisprudence so severe and unrelenting, by rendering men ferocious and desperate, would be more apt to multiply crimes than to restrain them." SANDERSON, *supra* note 172, at 203.

175 PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, *supra* note 174, at 154 (alteration in original). Again, that biographer noted that Clymer thought "[l]aw should be preventative more than vindictive;" therefore,

> [o]n the present occasion, he maintained that the fittest punishment of a criminal was that which, when meditated upon at the time, would be most likely to deter him from the commission of it: and in this view he believed that the contemplation of a long imprisonment would be of more effect than that of death.

SANDERSON, *supra* note 172, at 203.

176 PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, *supra* note 174, at 154.

177 He was also a famed appellate advocate. *See* LAWRENCE HENRY GIPSON, JARED INGERSOLL: A STUDY OF AMERICAN LOYALISM IN RELATION TO BRITISH COLONIAL GOVERNMENT 363–64 (1920).

178 S. JOURNAL, 36th Assemb. 341 (Pa. 1811).

179 S. JOURNAL, 37th Assemb. 179–80 (Pa. 1812).

180 *Id.* at 181.

about it. "The able and elaborate report of the attorney general on the subject of criminal jurisprudence," he said, "well merits an early attention. It [sic] philanthropic principles will I doubt not animate the new system which humanity anticipates as the result of your deliberations."[181]

And for decades after, the Supreme Court of Pennsylvania relied on Ingersoll's report as well. "The late Judge Ingersoll," said the court in a criminal case, was "a name respected and honoured . . . ."[182] And, along with Bradford's work, the court continued, Ingersoll's report formed "the most conclusive evidence" of the meaning and purpose of the earlier criminal law legislation.[183] Thus, the governor, Legislature and Supreme Court found his account authoritative.

And it illuminates the original meaning of Pennsylvania's anti-cruelty provision.[184] Ingersoll explained that "[a] wiser policy" of criminal law "determined to preserve" and "to reform," "rather than to destroy."[185] "[T]he principle upon which all criminal law rests," he elaborated, "is necessity."[186] Even "momentary deprivation of liberty by force, under any circumstances, would be unjustifiable, if it were not an expedient necessarily adopted for the general good. If then a less severe and awful penalty can effect the same purposes, or, in other words, if it be not *necessary* to punish murder with death, a milder medium of correction should be chosen."[187] For, "[n]o expediency can sanctify a measure in itself immoral; nor will the atrocity of crimes, however flagitious justify the exercise of a severity absolutely prohibited."[188] When punishments are unnecessarily severe, he added, "the laws themselves" will "appear to be exercised in cruelty."[189]

And his theory of punishment, underpinned by the principle of necessity, was not static. Societies, he wrote, evolve to render some punishments unnecessary. "[A]lthough the policy of many governments may require the forfeiture of life in some rare instances," he wrote of capital punishment,

> yet that society is capable of amelioration, which will render that resort unnecessary; and it is alleged, that the gradual improvement of manners and

181 S. JOURNAL, 38th Assemb. 20 (Pa. 1813).

182 James v. Commonwealth, 12 Serg. & Rawle 220, 232 (Pa. 1825).

183 *Id.*

184 Ingersoll, *supra* note 61, at 325.

185 *Id.*

186 *Id.* at 330.

187 *Id.* (emphasis added).

188 *Id.* at 329.

189 *Id.* at 330.

> morals, and the diffusion of learning and religion in Pennsylvania, have already induced such a state of things.[190]

So any punishment was cruel if it was unnecessary, and each "society is capable of amelioration, which will render that resort unnecessary."[191] Thus, a punishment could *become* cruel by becoming unnecessary.

Writing in 1812, Ingersoll knew that Pennsylvania's penal revolution was unfinished because it was so new. "If the end has not been completely attained," he wrote, "the effort has failed from no inadequacy of ability in those who devised or those who have administered the laws, but rather from the novelty of a design, as original as it was comprehensive and humane."[192] That is, the very fact that the Pennsylvania's approach was a rupture from the past ensured that it could only be the beginning. Knowledge had not advanced far enough; but it would advance further still.

More important than what they *did* in 1794, then, were the *principles* motivating their actions. Ingersoll believed that future generations would see further, standing on the shoulders of the Revolutionary Pennsylvanians' actions. "Laws which were adapted to one period," he wrote,

> will become inapplicable to another. A change of society, which accompanies the progress of time, will discover new wants and require new provisions; and the mere advancement of knowledge and experience will suggest amendments that in unimproved society would never have been contemplated. A revisal of the penal law indicates neither negligence in its framers, nor vices in the code.[193]

(6) Thomas Paine —— Paine was an adopted son of Pennsylvania. Arriving at the age of 37 with the help of Benjamin Franklin, he took a position at the *Pennsylvania Magazine*.[194] He became acquainted with Benjamin Rush,[195] an influential Pennsylvanian who signed the Declaration of Independence. Rush told Paine to write *Common Sense*.[196] The essay "quickly became one of the most successful and influential pamphlets in the

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190 *Id.* at 329.

191 *Id.*

192 *Id.* at 326.

193 *Id.* at 326–27.

194 Letter from Benjamin Franklin to Richard Bache (Sept. 30, 1774), *quoted in* THE WRITINGS OF BENJAMIN FRANKLIN 137–38 (Jared Sparks ed., 1906) ("The bearer, Mr. Thomas Paine, is very well recommended to me, as an ingenious, worthy young man. He goes to Pennsylvania with a view of settling there.").

195 *See infra* on Benjamin Rush.

196 Eric Foner, *Paine, Thomas* AM. NAT'L BIOGRAPHY (Feb. 2000).

history of political writing."[197] His work "was widely read throughout the colony."[198]

And Paine opposed sanguinary punishments. Like Montesquieu and Beccaria, he considered overly harsh penalties ineffective. They "inured [the human race] to the sanguinary arts and refinements of punishment; and it is exactly the same punishment, which has so long shocked the sight, and tormented the patience of the People, that now, in their turn, they practise in revenge on their oppressors."[199] Or, as he put it in a different essay, "[i]t is the[] sanguinary punishments which corrupt mankind . . . the effect of those cruel spectacles exhibited to the populace, is to destroy tenderness, or excite revenge; and by the base and false idea of governing men by terror. Instead of reason, they become precedents."[200] And he opposed severity on moral grounds as well. He believed that "[p]unishment is the tyrannical and odious part of a government's duty."[201]

And so he also espoused the necessity principle. He endorsed the French Declaration of Rights of Man's pronouncement that "[t]he law ought to impose no other penalties but such as are absolutely and evidently necessary: and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied."[202] He explained it was "declaratory of *principles* upon which laws shall be construed, conformable to *rights* already declared."[203]

And he advocated the outright abolition of capital punishment. "It has been already proposed to abolish the punishment of death," noted Paine in France. "This cause must find its advocates in every corner, where enlightened Politicians, and lovers of Humanity exist."[204] Let France, he wrote, "be the first to abolish the Punishment of Death, and to find out a milder and more effectual substitute."[205]

(7) Hugh Henry Brackenridge —— As Governor, Thomas McKean appointed Brackenridge to the Supreme Court of Pennsylvania. "[T]o men

197 *Id.*

198 KEN GORMLEY & JOY G. MCNALLEY, PENNSYLVANIA CONSTITUTION 42 (2d ed. 2020).

199 THOMAS PAINE, REASONS FOR PRESERVING THE LIFE OF LOUIS CAPET 18 (James Ridgeway 1793).

200 1 THOMAS PAINE, AN ILLUSTRATION OF THE RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION 25 (J. Crome 1792).

201 THOMAS PAINE, REFLECTIONS ON THE PRESENT STATE OF THE BRITISH NATION, *reprinted in* COLLECTION OF UNKNOWN WRITINGS 87 (Hazel Burgess ed., 2010).

202 Foner, *supra* note 196, at 90.

203 *Id.* at 92 (emphasis in original).

204 PAINE, *supra* note 199, at 18.

205 *Id.* at 19.

of the time," Farah Peterson has explained, "it was very obvious that legal talents were not equally distributed. Certain men, including . . . Brackenridge of Pennsylvania, along with a handful of others, distinguished themselves and had a disproportionate influence over their peers and over the direction of the law."[206]

Part of that influence was an influential text Brackenridge published. It traced the divergences from English common law specific to Pennsylvania.[207] "It struck me some time ago," he wrote in the introduction to the text:

> that it would be a work of utility for the *Student* of the Pennsylvania law; and *also* an exercise, or disquisition not without benefit to the *judge* himself, to examine in what particulars, the common and statute law of this state was different from that of the common, or statute law of England.[208]

His philosophy reflected Beccaria's,[209] whom Brackenridge noted was "at the head" of writers on criminal law.[210] "[T]he end of all punishment," wrote Brackenridge, were "*precavention* [sic] *and reformation*."[211] Capital punishment, he explained, was not the only way to prevent the offender from repeating the crime. The prison could do that. Nor, of course, was capital punishment capable of reforming the offender. He likewise found it unnecessary for deterring *others* by its example; for Brackenridge believed, like Beccaria, that capital punishment "count[ed] but little on the effect of a *present terror*, however *shocking the spectacle*."[212] And those were the only permissible aims of punishment, but none seemingly justified the punishment. So if "the state of society should be found to be such as to permit" eradicating the punishment "without endangering the community," Brackenridge thought it "unnecessary; and it is only in a case where unavoidable, and necessary, that [he] should think it justifiable."[213]

And this concept of necessity aged with society. He noted that the Bible declared "the murderer shall be put to death." "But what was the state of the Jewish society to whom this law was given? Were they," he asked rhetorically, "in a situation to be able to preserve themselves from homicide,

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206 Farah Peterson, *Expounding the Constitution*, 130 YALE L. J. 2, 75 (2020).

207 HENRY HUGH BRACKENRIDGE, LAW MISCELLANIES: CONTAINING AN INTRODUCTION TO THE STUDY OF THE LAW, NOTES ON BLACKSTONE'S COMMENTARIES, SHEWING THE VARIATIONS OF THE LAW OF PENNSYLVANIA FROM THE LAW OF ENGLAND (P. Byrny 1814).

208 *Id.* at i.

209 His approach to punishment, like Beccaria's, was grounded in his conception of the social contract. *See id.* at 238.

210 *Id.* at 497.

211 *Id.* at 239–40.

212 *Id.* at 243.

213 *Id.* at 241.

without such extermination of an individual who had committed murder?" To the contrary, they lived "[i]n a wandering state of society, in a wilderness."[214] So "could the injunction be understood otherwise as having relation to the condition of the people? Can it be of binding obligation at all times, and in all cases to put to death?"[215] "My deduction," he declared, "is that the injunction to Noah is not of universal application under all circumstances."[216] Instead, it was subject to its context. And the evolution of society changed that context.

(8) Gouverneur Morris —— Morris read law in New York and became a delegate to the Congress in Pennsylvania in 1778. Thereafter, he "began the practice of [his profession] in Philadelphia and became a citizen of Pennsylvania."[217] He was a delegate to the United States Constitutional Convention where he "consolidated the Convention's intent into a solid structure," actually wrote the famed preamble, and eventually signed the Document.[218] Although not typically associated with criminal law, Morris nonetheless explained in a letter to Peter Van Schaack near the end of the Revolutionary war, "[i]n the question of punishment for acts, it hath been my constant axiom, that the object is example, and therefore the thing only justifiable from necessity, and from the effect."[219]

(9) Benjamin Rush —— Benjamin Rush played an outsized role in Pennsylvania's penal revolution. In his influential essays, Rush outline the permissible purposes of punishment:

> —1st, to reform the person who suffers it,—2dly, to prevent the perpetration of crimes, by exciting terror in the minds of spectators; and,—3dly, to remove those persons from society, who have manifested, by their tempers and crimes, that they are unfit to live in it.[220]

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214 *Id.* at 239.

215 *Id.*

216 *Id.* at 241.

217 Catherine Keppele Meredith, *Sketch of the Life of Gouverneur Morris*, 2 PA. MAG. OF HIST. & BIOGRAPHY 185, 189 (1878).

218 WILLIAM HOWARD ADAMS, GOUVERNEUR MORRIS: AN INDEPENDENT LIFE 163–64 (2003).

219 *Id.* at 112.

220 BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS, AND UPON SOCIETY (1787), *reprinted in* ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 36 (Thomas & William Bradford, 1806) (1793). The publisher was Bradford's father, also William; *see also* Letter from Rush to John Coakley Lettsom (Sept. 28, 1787), *in* 1 LETTERS OF BENJAMIN RUSH (Lyman Henry Butterfield ed., Princeton University Press, 1951) (1761–1792) ("[T]he adoption of solitude and labor" in penitentiaries might become "the means of not only punishing but of reforming criminals." (his underlines)).

In a later essay, he narrowed those purposes further. "[T]he only design of punishment," he declared, "is the reformation of the criminal."[221] And he argued that "[l]aws can only be respected, and obeyed, while they bear an exact proportion to crimes."[222]

Rush categorically opposed capital punishment. He published essays across the 1780s and 1790s calling for its abolition. Contemporaries reflected that his arguments "adopted and defended the opinion of the Marquis of Beccaria."[223] He believed that executions inured viewers to the punishment, rendered convictions more difficult, and "multipl[ied] murders."[224] This was because "the *certainty* of punishments operates so much more than its severity, or infamy, in preventing crimes."[225] Twice he declared that the penalty of death was first "in degree, in folly and cruelty."[226]

Contrary to the U.S. Supreme Court's history, Rush looked not to the *past* to explain what was permissible in the present; he believed that punishment's limiting principle of necessity meant that society must look to the *present* to justify punishments. He explained that previous societies had used the death penalty because it was then necessary. But he declared that capital punishment's previous use "does not take away its immorality." His argument was similar to Brackenridge's: if "Indian" nations once used it, said Rush, "[t]he practice . . . must have originated in *necessity*; for a people who have no settled place of residence, and who are averse from all labour, could restrain murder in no way."[227] Similarly, "after the flood, the infancy and weakness of society rendered it impossible to punish murder by *confinement*," which ensured there "was no medium between inflicting death upon a murderer, and suffering him to escape with impunity, and thereby to perpetrate more acts of violence against his fellow creatures."[228] By contrast, he explained, "[i]f society can be secured from violence, by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation

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221 RUSH, *supra* note 220, at 152.

222 *Id.* at 146.

223 JAMES MEASE, THE PICTURE OF PHILADELPHIA 162 (B. & T. Kite, 1811); *see also* Albert Post, *Early Efforts to Abolish Capital Punishment in Pennsylvania*, 68 PA. MAG. OF HIST. AND BIOGRAPHY 38, 41 (1944); Davis, *supra* note 67, at 26 ("Borrowing from Beccaria's *Essay*, Rush answered critics in 1792 with his *Consideration on the Injustice and Impolity of Punishing Murder by Death*." (emphasis in original)).

224 RUSH, *supra* note 220, at 164.

225 *Id.* at 157.

226 *Id.* at 160.

227 BENJAMIN RUSH, CONSIDERATIONS ON THE INJUSTICE AND IMPOLICY OF PUNISHING MURDER BY DEATH 7 (Mathew Carey, 1792).

228 *Id.*

will be answered."[229] Purposes, not past practices, guide the present conception of cruelty.

And today's present is only the beginning. Punishments must withstand the scrutiny of tomorrow, too. Rush understood that he might have been ahead of his time in his certainty that capital punishment was *already* unnecessary and cruel; but he was equally certain that time would reveal this truth to an improving society. "To you, therefore, the unborn generations of the next century," he addressed his 1788 essay:

> I consecrate this humble tribute to justice. You will enjoy in point of knowledge, the meridian of a day, of which we only perceive the twilight. You will often review with equal contempt and horror, the indolence, ignorance and *cruelty* of your ancestors . . . [y]ou will see many modern opinions in religion and government turned upside downwards, and many new connexions [sic] established between cause and effect.[230]

A year later, he was "[m]ore sanguine than ever, in [his] expectations of the gradual introduction of wise and humane spirits into our systems of criminal jurisprudence."[231] "I still," Rush declared, "anticipate a victory equally honourable, of reason and religion over the present *cruelty* and folly of the criminal laws of the United States."[232]

D. THEORY INTO LAW: THE HISTORY OF PENNSYLVANIA'S PENAL REVOLUTION[233]

Pennsylvanians distilled their penological approach into constitutional and legislative enactments. At each turn, the belief that any unnecessary punishment was cruel and therefore impermissible motivated the changes.

Long before Pennsylvania became a state, it rebelled against the imposition of English penal laws. Bradford explained that "[i]t was the policy of [England] to keep the laws of the Colonies in unison with those of the

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229 RUSH, *supra* note 220, at 160.

230 Benjamin Rush, *An Enquiry into the Justice and Policy of Punishing Murder by Death, By the Author of the Enquiry into the Effects of Public Punishments upon Criminals and upon Society: Thou Shall Not Kill*, 4 AM. MUSEUM; OR THE REPOSITORY OF ANCIENT AND MOD. FUGITIVE PIECES &C. PROSE AND POETICAL 78, 81 (1788) (emphasis added).

231 Benjamin Rush, *Rejoinder to a Reply to the Enquiry into the Justice and Policy of Punishing Murder by Death*, 5 AM. MUSEUM, OR UNIVERSAL MAG., 121, 123 (1789) [hereinafter *Rejoinder to a Reply*].

232 *Id.* (emphasis added); *see also* RUSH, *supra* note 220, at 163 ("If these principles continue to extend their influence . . . the time is not very distant, when the gallows, the pillory, the stocks, the whipping-post, and the wheel-barrow (the usual engines of public punishments) will be connected with the history of the rack and the stake, as marks of the barbarity of ages and countries . . . ").

233 This section also draws on my thesis. *See* Bendesky, *supra* note 71.

mother country."[234] And that unity "extended," he explained, "even to the criminal code."[235] But this English-imposed severity was an invasive species in Pennsylvania's soil. Unlike Scalia's history, wherein Americans looked to the English Bill of Rights to determine what the American Bill of Rights should prohibit, Bradford explained that Pennsylvanians

> Perceive[d] . . . that the severity of our criminal law is an exotic plant and not the native growth of Pennsylvania. It has been endured but, I believe, has never been a favorite. The religious opinions of many of our citizens were in opposition to it: and, as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them. During our connection with Great Britain no reform was attempted: but, as soon as we separated from her, the public sentiment disclosed itself, and this benevolent undertaking was enjoined by the constitution. This was one of the first fruits of liberty, and confirms the remark of Montesquieu, 'That, as freedom advances, the severity of the penal law decreases.'[236]

These distinctly Pennsylvanian beliefs began with William Penn. "The penal law of Pennsylvania, unlike that of other governments," said Ingersoll in his authoritative account, "was disfigured in its early stages by no sanguinary provisions."[237] This was because, "[c]ruel and sanguinary punishments which had been multiplied under an ancient system," he elaborated, "were little adapted to people who had fled from persecution."[238] As the Supreme Court of Pennsylvania put it: "[t]he sanguinary code of England, could be no favourite with William Penn and his followers, who fled from persecution."[239] The Colony's founder had accordingly attempted to reject the penal laws from the "old and corrupted government[]" of England and to enact his own instead.[240] Penn's "complete[d] code of criminal law," said Bradford, "fitted to the state of his new settlement."[241]

But the English opposed Penn's measures. A struggle ensued. When England attempted to repeal Penn's Code, Pennsylvanians re-enacted them. The Colony and the Kingdom repeated this back-and-forth until Penn's death in 1718. Without him, the English system prevailed.

But that changed with Independence. In 1776, Pennsylvania seized the opportunity to abandon English cruelty. Beccaria's philosophy had its day.

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234 BRADFORD, *supra* note 60, at 14.

235 *Id.*

236 *Id.* at 20.

237 Ingersoll, *supra* note 61, at 325.

238 *Id.*

239 James v. Commonwealth, 12 Serg. & Rawle 220, 232 (Pa. 1825).

240 BRADFORD, *supra* note 60, at 12.

241 *Id.* at 15.

"[S]everal circumstances combined," said one contemporary observer, "to make the proper alteration expedient, and among others, the small and valuable gift of the immortal Beccaria to the world, had its due influence and weight."[242] As soon as the Commonwealth was free of political bonds, Bradford wrote, Beccaria's "humanitarian system, long admired in secret, was publicly adopted and incorporated by the Constitution of the State, which, spurred by the influence of this benign spirit, ordered the legislative bodies to render penalties less bloody, and, in general, more proportionate to crimes."[243] That constitution enjoined the Legislature to reform the penal laws;[244] make punishments "in general more proportionate to the crimes;"[245] implement "visible punishments of long duration" which would "deter more effectually" crimes;[246] and "make sanguinary punishments less necessary."[247]

Despite its mandate, the promise of the 1776 Constitution remained unfulfilled even a decade later. The war had gotten in the way. But "[i]mmediately after the peace of 1783 a number of prominent citizens of Philadelphia, led by Benjamin Franklin, Benjamin Rush, William Bradford and Caleb Lownes, organized a movement for the reform of the barbarous criminal code of 1718, which was still in force."[248] And so, in the same "Representation" to the Legislature in which Chief Justice McKean declared that "the great design of" punishments was deterrence, which should be attained by "certain but milder punishments," he also urged legislative action.[249] "[T]he authors of the constitution of this state have directed," wrote McKean and the Justices, "that, 'the penal laws formerly used should be reformed by the Legislature as soon as may be, and punishments in some cases made less sanguinary, and in general more proportionate to the crimes.'"[250] Moreover, McKean continued, the constitution called for the

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242 TURNBULL, *supra* note 62, at 6.

243 Pace, *supra* note 126, at 314 n.39; *see also* FRANÇOIS-ALEXANDRE-FRÉDÉRIC, DUC DE LA ROCHEFOUCAULD-LIANCOURT, A COMPARATIVE VIEW OF MILD AND SANGUINARY LAWS: AND THE GOOD EFFECTS OF THE FORMER, EXHIBITED IN THE PRESENT ECONOMY OF THE PRISONS OF PHILADELPHIA 24 (Darton & Harvey, 1796) (quoting another visitor to Pennsylvania: "The doctrines of Beccaria and [prison reformer John] Howard, were eagerly seized.").

244 PA. CONST., § 38 (1776).

245 *Id.*

246 PA. CONST., § 39 (1776).

247 *Id.*

248 HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 81 (1927).

249 PA. PACKET, Sept. 14, 1785, at 3; *see also* James Hedley Peeling, The Public Life of Thomas McKean, 1734–1817, at 186 (Mar. 1929) (Ph.D. dissertation, University of Chicago) (on file with the author) ("After the close of the [Revolutionary] war, the Chief Justice was one of the leading spirits in abolishing the severity of the penal laws in Pennsylvania.").

250 PA. PACKET, Sept. 14, 1785, at 3.

Legislature to "'deter more effectually from the commission of crimes, by continued and visible punishments of long duration, and to make sanguinary punishments less necessary."[251]

The other branches of government heeded the court's admonition. Pennsylvania President, John Dickinson—who had called Beccaria a "genius,"[252] "celebrated,"[253] and a "masterly hand"[254]—then "immediately laid before the General Assembly" the "representation from the honourable the Justices of the Supreme Court," "praying the House to take the premises into consideration."[255]

Soon after, Benjamin Franklin became President. He too raised the issue. He noted that debtors were locked in prison for fines they could not pay.[256] Such a situation neither reformed the offender nor deterred offenses.[257] He suggested instead the punishment of labor, which would "tend more to the prevention of offenses."[258] Indeed, "[i]n the General Reform of our penal laws, necessary in itself, and required by the thirty-eighth section of the Constitution," Franklin concluded "this particular will properly come before you."[259]

This time, the Legislature acted. It "refer[ed] [a proposed bill] to the . . . chief justice (the late Governor McKean) who it was supposed . . . must be master of the subject, and would set them right if they were wrong. His approbation was also deemed important to insure [sic] the passage of the bill."[260] Sure enough, with his approval, the Assembly passed the 1786 bill, limiting capital punishment to four crimes. The measure's preamble explained its motivating principle. Quoting the same famed Montesquieu passage on which Bradford had relied, the preamble announced that,

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251 *Id.*

252 JOHN DICKINSON, AN ESSAY, &C. (1774), *reprinted in* 1 THE POLITICAL WRITINGS OF JOHN DICKINSON 350 (Bonsal & Niles 1801).

253 JOHN DICKINSON, THE ADDRESS OF CONGRESS TO THE INHABITANTS OF QUEBEC (1774), *reprinted in* 2 THE POLITICAL WRITINGS OF JOHN DICKINSON 5 (Bonsal and Niles, 1801).

254 DICKINSON, AN ESSAY, *supra* note 252, at 351.

255 MINUTES OF THE SECOND SESSION OF THE NINTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, WHICH COMMENCED AT PHILADELPHIA ON TUESDAY, THE FIRST DAY OF FEB., IN THE YEAR OF OUR LORD, ONE THOUSAND SEVEN HUNDRED AND EIGHTY-FIVE 357–58 (Francis Bailey 1785).

256 14 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 575–76 (Theo. Fenn & Co., 1853).

257 *Id.*

258 *Id.* at 576.

259 *Id.*

260 JAMES MEASE, OBSERVATIONS ON THE PENITENTIARY SYSTEM, AND PENAL CODE OF PENNSYLVANIA: WITH SUGGESTIONS FOR THEIR IMPROVEMENT 61 n.* (Clark & Raser 1828).

> whereas it is the wish of every good government to reclaim rather than to destroy, and it being apprehended that the *cause of human corruptions proceed more from the impunity of crimes than from the moderation of punishments*, and it having been found by experience that the punishments directed by the laws now in force as well for capital as other inferior offences do not answer the principal ends of society in inflicting them, to wit, to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences . . . .[261]

Beccaria influenced the bill as well. Bradford told one of Beccaria's relatives that *On Crimes and Punishments* motivated the law. "One must attribute mainly to this excellent book," he wrote in a letter, "the honor of this revolution in our penal code."[262] The bill, Bradford elaborated, was "proof of the veneration my countrymen harbor for the opinions of your famous relative."[263]

But the 1786 law implemented public punishments, which proved a disaster. Many realized this. "The benefits expected from the penal laws, hav[e] not equaled the benevolent wishes of its friends and framers," said Franklin, speaking to the General Assembly again.[264] So "we recommend such alternations to be made in it as shall be calculated to render [a] punishment a means of reformation."[265]

Its principal methods were undermining its motivating principles. The system, explained another Pennsylvanian, was "executed with so much cruelty."[266] "Encumbered with iron collars and chains," convicted individuals were forced to labor in the streets while passersby taunted.[267] And it became the target of Benjamin Rush's *Enquiry into the Effects of Public Punishments*.[268]

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261 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280 (1906) (italics added to denote the Montesquieu quote; this quote is not the translation currently in use in the Cambridge Texts of Political Thought, *see* MONTESQUIEU, *supra* note 72).

262 Pace, *supra* note 126, at 314 n.39.

263 *Id.*

264 15 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 393 (Theo. Fenn & Co. 1853).

265 *Id.*

266 ROBERTS VAUX, NOTICES OF THE ORIGINAL, AND SUCCESSIVE EFFORTS, TO IMPROVE THE DISCIPLINE OF THE PRISON AT PHILADELPHIA 22 (Kimber & Sharpless, 1826).

267 *Id.*

268 That essay, in turn, inspired the creation of the Philadelphia Society for the Alleviation of the Miseries of Public Prison—still existing today as the Pennsylvania Prison Society. *See, e.g.*, Michael Vinson, *The Society for Political Inquiries: The Limits of Republican Discourse in Philadelphia on the Eve of the Constitutional Convention,* 113 PA. MAG. OF HIST. AND BIOGRAPHY 193–96 (1989) (describing the impact that Rush's essay had on the creation of the Society); *see generally* NEGLEY TEETERS, THEY

In response, the Assembly created a committee in 1789 to address the problem. George Clymer led the legislative movement.[269] His committee's motivating values, he explained, were "a doubt of the right to take away the life of man, except where it is expressly authorized by" God; "an earnest wish to reform the profligate, by a due execution of a wise but lenient system of laws;" and "an anxious desire to afford security to the lives and property of the good people of this commonwealth, without the shedding of human blood."[270]

Soon after, the Assembly attempted a second application of Pennsylvania's first principles. Again with the help of Clymer's pen,[271] it passed the bill of 1790, the preamble of which explained that, because the earlier measure had "failed of success," the Legislature hoped the second attempt would successfully "carry[] the provisions of the constitution [of 1776] into effect."[272] The committee further "hoped" that, "as far as it can be effected," the bill "w[ould] contribute as much to reform as to deter."[273]

This Bill created the Walnut Street Prison. "[B]urst from the chains which have long and cruelly bound it" in England, "Pennsylvania has pointed out the necessity of" penal reform, and "furnished to the world an instance of good sense and virtue, which must redound to her honor, for ages yet in the womb of time," said a visitor to the prison.[274] Nor was that bill the only action in 1790.

WERE IN PRISON (1937) (chronicling the history of the Society from its founding to the time of the book's publication). John Dickinson contributed to its founding. *See* William White, *To the Friends of Humanity*, THE PA. GAZETTE, Aug. 22, 1787, at 3 (documenting Dickinson's monetary contribution to the society at its founding). I am thankful to Professor Jane Calvert of the Dickinson Writing Project for pointing this out to me. The Prison Society played a prominent role in getting the 1786 bill repealed.

269 *See, e.g.*, Walter H. Mohr, *George Clymer*, 5 PA. HIST. J. MID-ATL. STUD. 282, 283 (1938) (chronicling the life of the Founding Father and Pennsylvania native George Clymer and his role in recommending mitigation of the penal code as a member of the Pennsylvania Assembly).

270 MINUTES OF THE THIRTEENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, IN THEIR SECOND SESSION, WHICH COMMENCED AT PHILADELPHIA, ON TUESDAY, THE THIRD DAY OF FEB., . . . ONE THOUSAND SEVEN HUNDRED AND EIGHTY-NINE 132 (Hall & Sellers, 1789).

271 *See id*. at 137 (appointing a committee including Clymer to draft the 1790 bill).

272 PURDON, *supra* note 66, at 699.

273 *Id.* The regulation within the prisons confirms that the principles of leniency, certainty and necessity guided punishments. "*Mild regulations, strictly enjoined*," said Caleb Lownes in his Report on the Gaol, will meet with little resistance. *See* CALEB LOWNES, *An Account of the Gaol and Penitentiary House of Philadelphia, and the Interior Management Thereof*, *in* BRADFORD, *supra* note 60, at 83. When there is certainty, "there will be little necessity for seeking for *the punishment* that shall be the most effectual." *Id.* (his italics). And only "if *punishments* be deemed necessary, let those of *a disgraceful nature* be avoided." *Id.* (his italics).

274 TURNBULL, *supra* note 62, at 2.

That same year, the Commonwealth instantiated these ideals into today's constitutional right, prohibiting all "cruel punishments."[275] As Bradford explained, Beccaria's "humanitarian system . . . was publicly adopted and incorporated by the Constitution of the State in 1776."[276] And that document's mandate for *legislative action* encapsulated the same meaning *into the right* the 1790 constitution granted.[277] Those constitutions which proscribe "sanguinary punishments," explained Bradford, all "involve the same principle," as those that declare "[t]hat cruel punishments ought not to be inflicted."[278] Both, he declared, "prohibit every penalty which is not evidently necessary[.]"[279] For "*every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act.*"[280] Likewise, the 1790 law, passed the same year as the "cruel punishments" prohibition,[281] aimed to fulfil the promises of the 1776 Constitution. And as Johnson's Dictionary of the time explains, the first definition of sanguinary *was* "cruel."[282]

But even after 1790, reform remained unfinished; the understanding of "necessity" evolved. Rush kept writing. He published his *Enquiry into the Justice and Policy of Punishing Murder by Death* in the nationally syndicated *American Museum*.[283] Then he published his "Rejoinder" in the same paper.[284] In 1792, he wrote *Considerations on the Injustice and Impolicy of Punishing Murder by Death*.[285] Throughout each essay, he pressed this distinctly Pennsylvanian approach to punishment.

In 1793, the Commonwealth's first governor, Thomas Mifflin, instigated the final push. He asked Bradford to study the necessity of capital punishments. "The desire you have expressed to see the Criminal Code rendered as perfect as possible," wrote Bradford after finishing the report, "has induced me to call into view the principles, as well as the facts, relative

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275 PA. CONST. art. I, § 13.

276 Pace, *supra* note 126, at 314 n.39.

277 BRADFORD, *supra* note 60.

278 *Id.*

279 *Id.* at 4–5.

280 *Id.* at 4 (his italics).

281 It was before the 1790 constitution passed but after the Constitutional Convention first convened in 1789. *Compare* Foster, *supra* note 105, at 122 (noting that they met in November 1789 and adjourned ten months later), *with* 13 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 511–28 (James T. Mitchell & Henry Flanders, eds., 1908) (stating that the bill passed in April of 1790).

282 *See* JOHNSON, *supra* note 63.

283 *Supra* note 227.

284 *Rejoinder to a Reply*, *supra* note 231 (arguing that punishing murder by death offends humanity's universal sense of justice).

285 RUSH, *supra* note 224.

to this subject."[286] Thus, "in compliance with the respect with which you lately honored me," Bradford "transmit[ed] to [Mifflin] the inclosed observations, calculated to ascertain how far capital punishments are necessary in Pennsylvania."[287]

The report laid out the same principles. The title page mirrored the landmark 1786 bill by quoting the same passage from Montesquieu: "[i]f we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments."[288] So too Bradford wrote that "[t]he general principles upon which penal laws ought to be founded appear to be fully settled. Montesquieu and Beccaria led the way in the discussion."[289]

Mifflin then ensured that the Assembly received the report. It was "from satisfactory evidence," he told the Assembly, "that the experiment in rendering the penal laws of Pennsylvania less sanguinary, has been attended with an obvious decrease of the number and atrocity of offences." Mifflin, in referring the Legislature to Bradford's work, declared that "while we consider the prevention of crimes to the be sole end of punishment, we, also, admit, that every punishment, which is not absolutely necessary for that purpose, is an act of tyranny and cruelty."[290]

The Senate received Bradford's report with enthusiasm. It placed the report in its Journal and appointed a committee to study the proposed reformation.[291] Rush even believed that "humanity and reason are likely to prevail so far in our legislature that a law will probably pass in a few weeks to abolish capital punishment in *all cases* whatever."[292]

The committee came very close to just that—on the basis of necessity. Noting that that its mandate was "a mitigation of the punishment" of death "in all cases (except high treason and murder), it declared that the "proposed mitigation will not only render penalties more proportioned to offense, but be equally effectual in the prevention of crimes, which is the sole end of punishment."[293] But it was also was prepared to go further—if evidence showed that the punishment was not necessary even for murder with malice aforethought. In 1793, however, the evidence of necessity was inconclusive.

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286 William Bradford, SUPPLEMENT TO DUNLAP'S AM. DAILY ADVERTISER, Jan. 14, 1793, at 1.

287 *Id.*

288 BRADFORD, *supra* note 60, at 10, 57.

289 *Id.* at 3.

290 S. JOURNAL, 17th Assemb. 14 (Pa. 1792).

291 *Supra* note 70, at 38.

292 RUSH, *supra* note 220, at 628 (his italics).

293 S. JOURNAL, 17th Assemb. 114 (Pa. 1792).

"The committee further report," it said, "that they have doubts at present, whether the terrible punishment of death be, in any case, justifiable and necessary in Pennsylvania."[294] Uncertain about its necessity, the Legislature deferred the question.[295] Thus evidentiary insufficiency, not constitutional uncertainty, kept capital punishment.

As an Associate Justice, Bradford actually *wrote* the resulting bill of 1794.[296] Rush proclaimed in one of his essays advocating abolition, that "[i]t would be an act of injustice in this place not to acknowledge that the principles contained in the foregoing essays, would probably have never been realized, had they not been supported and enforced by the eloquence of the late William Bradford Esq."[297] And he credited his own principles as well: "the Author," said Rush of himself, "has had the pleasure of seeing his principles reduced to practice in the State of Pennsylvania, in the abolition of the punishment of death for all crimes, (the highest degree of murder excepted) and in private punishments being substituted to those which were public."[298]

The 1794 law once again articulated the governing principle of Pennsylvania's jurisprudence. It declared that "it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety."[299]

So the first Penal Code passed after the new constitution declared that only necessity justified a punishment. And, as the U.S. Supreme Court has said, "[t]he actions of the First Congress"—including "promulgat[ing] the . . . first Penal Code"— "are of course persuasive evidence of what the Constitution means."[300] Here, Pennsylvania's First Assembly's actions are evidence that Section 13's constitutional "cruelty" proscribes anything unnecessary.

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In summary, the 1786 bill followed Chief Justice McKean's admonition that "the end of all human punishments," was "the security of society" and,

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294 *Id.* at 115.

295 *See id.* at 124–26.

296 Personal Sketches, William Bradford to the Editor of the Inquirer, *in* THE WALLACE COLLECTION, HIST. SOC'Y OF PA., Mar. 4, 1846 (noting that the draft of the bill "has been attributed to [Bradford's] pen.").

297 RUSH, *supra* note 224, at 164, 181–82.

298 *Id.* at 181.

299 PURDON, *supra* note 66, at 646–67.

300 Harmelin v. Michigan, 501 U.S. 957, 980 (1991).

"if this great design could be attained by certain but milder punishments," the Commonwealth must do so.[301] Benjamin Rush then prompted repeal of the 1786 bill through writing that capital punishment was first "in degree [of] folly and cruelty," because "[i]f society can be secured from violence, by confining the murderer, so as to prevent a repetition of his crime, the end of extirpation will be answered."[302] George Clymer drafted the 1790 replacement, passed the same year as the new constitution. In debates for that bill, he argued that "it would give concern to every man of humanity to be obliged to go back to our former mode of punishing crimes by death, while more lenient measures can be attended with equal success."[303] Finally, William Bradford then wrote the 1794 measure. His essay, placed in the Senate Journal, explained that the proclamation "that cruel punishments ought not to be inflicted . . . 'involve[s] the same principle, and implicitly prohibit[s] every penalty which is not evidently necessary."[304] And that bill's preamble explained that "the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety."[305]

At each turn, this distinctly Pennsylvanian emphasis on punishment's necessity defined the purpose and meaning of the legal texts, including the prohibition on "cruel" punishments. The lofty ideals pointed to a more humane criminal legal system: leniency preferred, severity limited, retribution discarded. Beyond that, any punishment was cruel. This was the principle that Section 13 codified.

Still, each step forward was incremental. Early Pennsylvanians did not abolish the death penalty, and their reform moved from public punishments to the penitentiary, emphasizing forced labor and isolation. Pennsylvania reformers believed that the penitentiary promoted penitence.[306] As Caleb Lownes, the Walnut Street Prison's first overseer, explained, "Montesquieu [and] Beccaria . . . ha[d] thrown considerable light upon" the theory of punishment, inspiring the prison as a repudiation of "the errors in principle, and the cruelties in practice, of the criminal laws of most countries in Europe."[307] With that change, "Pennsylvania ha[d] gone the *farthest* in the

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301 PA. PACKET, Sept. 14, 1785, at 2.

302 RUSH, *supra* note 220, at 160.

303 PROCEEDINGS AND DEBATES OF THE GENERAL ASSEMBLY OF PENNSYLVANIA, *supra* note 174, at 154.

304 BRADFORD, *supra* note 60, at 4–5.

305 PURDON, *supra* note 66, at 646–47.

306 *See e.g.*, Michael Meranze, *The Penitental Ideal in Late Eighteenth Century Philadelphia*, 108 PA. MAG. OF HIST. & BIOGRAPHY 419 420 (1984)

307 LOWNES, *supra* note 273, at 76.

formation of such a system, of any government that has come to my knowledge."[308] But even they realized the prison system they implemented was not the final, but rather the first, step. Like Bradford, Lownes declared his "reason to hope that she will be the first to place the *fair* 'key stone to the arch of this benevolent work.'"[309]

So the original meaning of the texts, not the actions of the authors, defines the historical content of Section 13. Indeed, inherent in that original meaning is a call to look beyond the Founders' own actions. Pennsylvanians understood cruelty as meaning anything exceeding the severity necessary for reformation and deterrence—according to contemporary, not eighteenth century, science. By the very logic of those who originally espoused it, sanctions such as mandatory life imprisonment or solitary confinement must withstand today's science, not last century's.

E. EARLY PENNSYLVANIA CASE LAW ON CRIMINAL PUNISHMENTS

The Supreme Court of Pennsylvania's early case law corroborates this historical account of Section 13's original meaning. It illuminates Pennsylvania's distinctive belief in the limited purposes of punishment and highlights how the early statutes codified that philosophy. It also shows how Pennsylvania's cruelty prohibition had its own, well-understood meaning for over a century before the U.S. Supreme Court incorporated the Eighth Amendment against the states. After that, the original meaning went missing. Today, it should be recovered.

In 1825, the Pennsylvania court first expounded upon this approach to punishments. The case, *James v. Commonwealth*,[310] concerned whether the State could punish a "common scold" by plunging her into water three times with a "ducking stool."[311] Justice Duncan, "whose experience in the criminal jurisprudence in this county was more extensive than that of any man of his day,"[312] wrote the opinion. He took "into consideration the humane provisions of the constitutions of the *United States* and of this State, as to cruel and unusual punishments" insofar as "they show[ed] the sense of the whole community."[313] Indeed, James's lawyer, recognizing the distinction between the two documents, had argued "that this judgement was in contravention of

308 *Id.* (emphasis added).

309 *Id.*

310 12 Serg. & Rawle 220 (Pa. 1825).

311 *Id.* at 220–21.

312 Clellans v. Commonwealth, 8 Pa. 223, 228 (Pa. 1848).

313 12 Serg. & Rawle at 235 (emphasis added).

the constitution of *Pennsylvania*, which declares that 'no cruel punishments shall be inflicted.'"[314] Likewise, the State Attorney General conceded that "[i]t is remarkable, that the constitution of Pennsylvania, many of the articles of which are copied literally from that of the United States, has omitted the word 'unusual,' and prescribes only *cruel* punishments."[315]

Duncan rejected the ducking stool as incompatible with the goals of reformation and deterrence, which were "the just foundation and object of *all punishments*."[316] The main thrust of his opinion followed from the intellectual history of punishment in Pennsylvania. He relied on the writings of James Wilson, William Bradford, and Jared Ingersoll. He noted that Wilson had decried punishments *ad libidium*—punishments aiming only to embarrass. Likewise, he cited Bradford and the Act of 1790 to demonstrate the link between a punishment's purpose and its potential "cruelty." "The object of the framers of the act of 1790," he explained, "was the abolition of all infamous, disgraceful, public punishments—*all cruel and unnatural punishments*—for all the classes of minor offences and misdemeanor[s], to which they had been before applied."[317] And Duncan cited the conclusion in the report of "Judge Ingersoll" that "cruel and unnatural punishments, which tended only to harden and confirm the criminal, had been abolished for all inferior offences."[318]

Because the ducking stool was not designed to reform the culprit or deter others, the court held that it was therefore a cruel and unnatural punishment. As Justice Duncan summarized, "[i]f the reformation of the culprit, and prevention of the crime, be the just foundation and objects of all punishments, nothing could be further removed from these salutary ends, than the infliction in question."[319] Pennsylvania would thus not tolerate it.

The court reiterated this philosophy in the twentieth Century—again, before the U.S. Supreme Court held that the Eighth Amendment applies to the states. Prior to becoming Pennsylvania's Chief Justice, Horace Stern wrote an opinion on the Common Pleas Court "so able and illuminating that" the Supreme Court of Pennsylvania would later "quote with approval"[320] its "demonstrat[ion] that the necessity for appropriate

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314 *Id.* at 221 (emphasis added).

315 *Id.* at 223.

316 *Id.* at 235 (emphasis added).

317 *Id.* at 231 (emphasis added).

318 *Id.* at 232.

319 *Id.* at 235.

320 Commonwealth v. Elliot, 89 A.2d 782, 784 (Pa. 1952) (citing Commonwealth v. Ritter, 13 Pa. D. & C. 285, 288, 291–92 (1930)).

punishment in criminal cases is chiefly in the interest of the protection of society."[321]

The Common Pleas case, *Commonwealth v. Ritter*,[322] addressed how the purposes of punishment should guide juror discretion in capital sentencing. The court had determined that William Ritter was guilty of first-degree murder, but "[t]he real question for the determination of the court [wa]s as to the penalty."[323] The relevant statute "le[ft] the penalty entirely to the discretion of the jury," failing to "prescribe . . . rules for guidance" or to "give any indication . . . as to the basis upon which such discretion was to be exercised."[324] Then-Judge Stern explained that, although the facts of a case determine how the jury should wield its discretion, the purpose of punishment defines how the jury should view the facts. For instance, if the point is retribution, then a juror might look at what "degree of suffering" is required for enacting society's revenge; but if one believes, by contrast, that the point of punishment is deterrence, then "a totally different study of the facts must be made."[325] And so the "crucial question underlying [*Ritter*] and similar cases," said Stern, was "what is the purpose or object at which the law aims in the sentencing of those convicted of crime?"[326]

He traced the history of punishment to find his answer. Stern noted that Beccaria's text was an "epoch-making work," launching a revolution in criminology.[327] And he rejected retribution as a justification for punishment because it "looks to the past and not the future, and rests solely upon the foundation of vindictive justice."[328] The "entire course . . . of the refinement and humanizing of society," he explained, "ha[d] been in the direction of dispelling from penology any such theory."[329]

He accepted two other justifications. "[W]here a tribunal is called upon to determine the penalty to be imposed upon a murderer," said then-Judge Stern, "the two elements which should be taken into consideration are those of restraint and deterrence."[330] In approving of deterrence, he referenced Beccaria's claim that "[t]he end of punishment is simply to prevent the

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321 Commonwealth v. Carluccetti, 85 A.2d 391, 400 (Pa. 1952) (Stearne, J., dissenting) (citing *Ritter*, 13 Pa. D. & C. 285).

322 13 Pa. D. & C. 285 (1930).

323 *Id.* at 288.

324 *Id.*

325 *Id.* at 289.

326 *Id.*

327 *Id.*

328 *Id.* at 290.

329 *Id.*

330 *Id.* at 293.

criminal from doing further injury to society and to prevent others from committing the like offense."[331] And incapacitation, he added, was "[n]ot only . . . justifiable" but was "vital to the protection of society."[332] If "there is a danger that a defendant may again commit crime, society should restrain his liberty until such danger be past."[333] And, only "if *reasonably necessary* for" ensuring that the danger is past, may a state "terminate [the defendant's] life."[334]

IV. ZETTLEMOYER'S INCOMPLETE HISTORY

The meaning of Pennsylvania's cruel punishment clause was therefore clear before 1962 when the U.S. Supreme Court held that the Eighth Amendment applies to the states. It was "cruel" to punish anyone more severely than necessary to deter crime and rehabilitate offenders. The contemporary comments of the Commonwealth's Framers demonstrate this. The statutory history and text of the first penal laws corroborate it. And early case law confirms it. Only such a full history can account for what Pennsylvanians understood "cruelty" to mean.

But in *Commonwealth v. Zettlemoyer*,[335] the State Supreme Court "decline[d] the invitation" to hold that Section 13 contains any meaning independent from the Eighth Amendment's.[336] In 1983, Keith Zettlemoyer argued that capital punishment was *per se* cruel and therefore unconstitutional under Section 13. Rejecting this claim, the court held instead "that the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments."[337]

The court's analysis looked to history, but its account was cursory. It concluded that because other constitutional provisions contemplated capital punishment, the framers of the Pennsylvania Constitution did not deem capital punishment unconstitutional.[338] It decided that the punishment must

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331 *Id.* at 290.

332 *Id.* at 291.

333 *Id.*

334 *Id.* (emphasis added).

335 Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982).

336 *Id.* at 967.

337 *Id.*

338 *Id.* at 968. *See also id.* at 967 n.28 ("Announcing the result of the Court, Mr. Justice Stewart stated: 'It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers . . . . The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the

be permissible today because Pennsylvania law had always allowed it—from William Penn's pre-Independence reform laws, through the late eighteenth century penal revolution, into the 1980s. And for proof, it cited prior decisions that implied the permissibility of death as a punishment.[339]

But this approach to constitutional history entirely eschews the original meaning of the provision. Rather than determine what the "cruel punishments" provision means, the court looked to *other* clauses. Rather than determine the *meaning* of the words to Pennsylvanians in 1790, the court instead looked only at their *actions*. That is a mistaken approach to mining original meaning for two reasons.

First, in declaring that the Founders did not think capital punishment cruel because they permitted it, the court failed to account for *why* Pennsylvanians authorized it and *why* the constitutional text permitted it. As this paper has explained, Pennsylvanians had a justification for retaining capital punishment: they thought it was necessary in a narrow set of circumstances. But the necessity principle undermines the conclusion that retention in 1789 entails permissibility now. To heed only the Founders' actions is to be unfaithful to their beliefs.[340]

Second, this form of constitutional reading also conflates the meaning of a clause with the facts to which that meaning applies—a distinction articulated

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prosecution of capital cases: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." 'And the Fourteenth Amendment, adopted over three/quarters of a century later, similarly contemplates the existence of the capital sanction . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 177 (1976))).

339 Interestingly, one of the two cases cited states the following: "The imposition of the death penalty by a judicial tribunal should be made only when it is the *sole* penalty justified both by the criminal act and the criminal himself and then only after a full and exhaustive inquiry into both the criminal act and the criminal himself." Commonwealth v. Green, 151 A.2d 241, 247 (Pa. 1959).

340 There is a related but separate distinction worth noting as well. At first, originalists looked to the *intent* of the Framers. But contemporary originalists have the abandoned quest for *original intent* and replaced it with a search for original *meaning*. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4–5 nn.9–12 (2018) (outlining the history of the shift). Justice Scalia himself called for "chang[ing] the label from the Doctrine of Original Intent to the Doctrine of Original Meaning." Justice Scalia, *Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep't of Just. ed., 1987). The relevance of the Framers' views is not, as Scalia explained, "because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 2d. ed. 2018) (elaborating further on the justifications). This is why, as he explained in *Harmelin*, "[t]he *actions* of the First Congress . . . are of course persuasive evidence of what the Constitution means." 501 U.S. at 980 (citations omitted). That is, actions elucidate *meaning*.

in contemporary originalist scholarship and inherent in the Commonwealth's Founders' belief that "cruelty" was an evolving science.[341] They might well have believed that capital punishment was not "cruel" *then* because it did not meet the legal meaning of cruel punishment under *their* factual knowledge and social norms. But although a constitution's legal meaning remains the same, contemporary originalism applies that original meaning to *today's* factual knowledge. This has practical consequences.

Take, for instance, solitary confinement. Suppose for a moment that the original meaning of "cruel" was "damaging to the person." 1794 was a century prior to the birth of psychology as a discipline. This would prevent a prohibition on punishments "damaging to the person" from applying to a punishment whose "ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh."[342] But the Founders' ignorance would not bind later interpreters who benefitted from contemporary science. Instead, subsequent interpreters would apply the original meaning to contemporary facts. Originalists, explains one leading theorist, "summarize this idea in the following way: the communicative content of the constitutional text is fixed at the time of framing and ratification, but the facts to which the text can be applied change over time."[343]

Under this philosophy, even if the term was not understood as evolving, it might now prohibit different punishments than it did in 1790. The original meaning of "cruel" was one that incorporated factual questions: is the punishment necessary? Put more specifically, the original meaning asked if a punishment reformed the offender and deterred others. Different legal

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341 *See, e.g.*, Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006) (arguing that the meaning of a constitutional clause can differ from the facts to which the Framers expected it to apply). Green also discusses the possibility that our actions are not always consistent with our principles—including the principles we enshrine in text. These were, after all, enslavers who once wrote that all men were created equal. And we should be bound by the principles they wrote down, not their failure in living up to those principles. *Id.*

342 CHARLES DICKENS, AMERICAN NOTES AND PICTURES FROM ITALY 118 (Heron Books, Centennial Ed., 1846).

343 Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 21 (2015); *see also* Solum, *Originalist Methodology* 84 U. CHI. L. REV. 269 (2017) (articulating an originalist methodology sensitive to the distinction between semantic content and factual application of that content); *see also* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. PUB. POL'Y. 818, 852–53 ("One familiar feature of legal rules is that the same rule can produce changing outcomes over time. Rules usually take account of various facts about the world; when the facts change, the outcomes change too. As a result, when we try to explain a legal development that differs from the Founding era, arguing that it's simply a change in application is usually taken as a *good* argument, even if the outcome diverges from the Founding generation's specific plans or intentions." (footnote omitted)).

outcomes obtain if you apply that meaning to today's world. As Brackenridge put it, "could the injunction be understood otherwise as having relation to the condition of the people?"[344]

What's more, in the context of Section 13, Pennsylvanians in fact understood the original meaning of "cruel" *as an inherently evolving principle*. So even according to the narrowest strain of originalism, the application of the "cruel punishments" clause in 1790 would not bind courts today. Justice Scalia, for instance, believed that both legal meaning and factual content were fixed at the Founding.[345] He admitted that it would be *possible* "to say that [the Framers] originally intended that the Cruel and Unusual Punishment Clause would have an evolving content—that 'cruel and unusual' originally meant 'cruel and unusual for the age in question' and not 'cruel and unusual in 1791.'"[346] But as perfectly justifiable as this would be, Scalia said, "to be faithful to originalist philosophy, one must not only say this but demonstrate it to be so on the basis of some textual or historical evidence."[347] He claimed to "know of no historical evidence for that meaning" in the Federal Constitution.[348] But this is not the case for Pennsylvania.

As this paper has shown, evidence abounds that Pennsylvanians originally understood Section 13 to mean "cruel . . . for the age in question." Revolutionary Pennsylvanians believed that "cruel" punishments were those not necessary for rehabilitating offenders and deterring others *according to contemporaneous morality and science*. So, under any theory of originalist constitutional adjudication, the incompleteness of *Zettlemoyer*'s historical account and theory of original meaning undermines its holding.

Yet *Zettlemoyer*'s frailites form the bedrock of the court's "cruel punishments" jurisprudence. Just three years ago in *Commonwealth v. Hairston*,[349] the court rejected a claim to depart from federal precedent "[i]n particular" because *Zettlemoyer* had "emphasized first that the framers of our Constitution, like their counterparts drafting the United States Constitution, did not believe that capital punishment was a 'per se violation of the

344 BRACKENRIDGE, *supra* note 207, at 239.

345 *See, e.g.*, Ronald Dworkin, *The Arduous Virtue of Fidelity: Scalia, Tribe, and Nerve*, 65 FORDHAM. L. REV. 1249, 1256–58 (1997).

346 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (arguing that Scalia believed legal content was both fixed at the time of ratification and also only applied to facts of that time).

347 *Id.* at 861–62.

348 *Id.* at 862.

349 Commonwealth v. Hairston, 249 A.3d 1046 (Pa. 2021).

prohibition against 'cruel punishments.'"[350] So too the court noted in 2001 that "in [*Zettlemoyer*], after a thorough historical review, this court rejected the argument that Article 1, Section 13 provided greater protection against the imposition of a sentence of death than the Eighth Amendment."[351] And even when Chief Justice Castille questioned in a concurrence the co-extensiveness of Section 13 and the Eighth Amendment, he found himself bound to admit that "it was a difficult claim to make in a jurisdiction where the death penalty had a long history."[352] But the mistake is not merely the bench's.

The bar has never given the court a fair chance to revise its mistake. "[N]othing in the arguments presented," said the court in a 2013 case on juvenile offenders, "suggests that Pennsylvania's history favors a broader proportionality rule than what is required by the United States Supreme Court."[353] And in other cases, appellants have outright conceded the historical ground. In *Commonwealth v. Means*, for instance, the court noted that "[a]ppellee recognize[d]" *Zettlemoyer*'s "thorough historical review."[354]

But the failure in the past must not doom litigants in the future. Indeed, in each attempt at expanding the protections provided in Section 13, the court has noted it did not receive a full *Edmunds* brief.[355] Nor did the court receive such a brief in *Zettlemoyer*. In fact, it could not have. *Zettlemoyer* predated *Edmunds*. The court therefore refused to depart in 1982 before the "watershed" decision of *Edmunds* in which it established the procedures for doing so.[356]

That means the court's holding that Section 13 and the Eighth Amendment are co-extensive rests "in particular" on *Zettelmoyer*'s incomplete historical account. That incomplete account derived at least in part because history was not a focal point at the time. And the court has since acknowledged that litigants have continued to fail to fill in the historical

350 *Id.* at 1058.

351 Commonwealth v. Means, 773 A.2d 143, 151 (Pa. 2001) (citation omitted).

352 Commonwealth v. Baker, 78 A.3d 1044, 1053 (Pa. 2013) (Castille, C.J., concurring).

353 Commonwealth v. Batts, 66 A.3d 286, 299 (Pa. 2013).

354 773 A.2d at 151.

355 *See, e.g.*, 773 A.2d at 151 (noting that Appellee did not attempt to challenge *Zettlemoyer*'s holding that Article 1, Section 13 provides no greater protection against a sentence of death than the Eighth Amendment); *see also* 66 A.3d at 298 (internal citations omitted) (summarizing Appellant's *Edmunds* brief, which did not discuss the Cruel Punishment Clause's distinct history); *see also* Commonwealth v. Baker, 78 A.3d 1044, 1048 n.5 (Pa. 2013) (noting that Appellant argued his claim should be resolved under the Eighth Amendment, not Article 1, Section 13); Commonwealth. v. Perez, 93 A.3d 829, 843 (Pa. 2014) (citing Brief of Appellants, at 23); *see also* Commonwealth v. Hairston, 249 A.3d at 1058 n.7 (noting that Hairston did not provide an *Edmunds* analysis in support of his Article 1, Section 13 claim).

356 *See supra* note 22 and accompanying text.

record. That must change. For it is now time to place the "key-stone to the arch" and unlock Section 13's original meaning.

CONCLUSION

Faithfulness to state constitutions requires imparting state-based meanings into state constitutional texts. Nobody doubts that where a state constitution grants a right that the U.S. Constitution does not—such as to public education—the state charter requires its own meaning. But the same is true where text is dissimilar or indeed even where the only difference is unique state history. In each case, the necessity of independent judicial review is urgent. To ignore such divergent meanings is akin to ignoring entirely divergent provisions. Here, the U.S. Supreme Court's analysis of the Eighth Amendment's original meaning is incompatible with both Section 13's text and its history. The result is an irony: to adhere to the Eighth Amendment is to ignore Pennsylvania's uniqueness.

So too principled consistency is integral to the legitimacy of the state constitutional enterprise. To depart where there is no textual or historical distinction but adhere where there is erodes the legitimacy that state constitutionalism requires. Procedural consistency is a necessary foundation for belief in the impartiality of judicial doctrines.[357] In Pennsylvania, the court has a history of departing where, unlike Section 13's genealogy, little state-based evidence supports an independent meaning.[358] But where, as here, "a state constitutional provision has particular textual or historical features that distinguish it from its federal counterpart, judicial interpretation *can and must* reflect those state-specific features."[359] And yet, the court has not done so despite Section 13's distinct features. So recognizing the unique aspect of Pennsylvania's origin story, which resulted in a textually distinct guarantee against cruel punishments, would not only make Section 13 jurisprudence more faithful to the Commonwealth's constitution, it would also render its state constitutionalism more principally consistent.

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357 Edith Barrett-Howard & Tom R. Tyler, *Procedural Justice as a Criterion in Allocation Decisions*, 50 J. OF PERSONALITY & SOC. PSYCH. 296, 303 (1986).

358 *See* Liu, *supra* note 6, at 1311 ("The legitimacy of independent state constitutionalism rests on basic structural postulates, not necessarily on the development of state-centric constitutional discourse. And it is precisely in those areas where state courts do not employ state-specific reasoning that their decisions have influence beyond their borders and contribute to the making of American constitutional law.").

359 *Id.* at 1330 (emphasis added).

When the citizens of the newly independent Commonwealth of Pennsylvania began to overhaul their penal laws, they were stepping out on the world stage. And they knew it. Harkening back to the days of William Penn, they rejected the English-imposed system of capital punishments that had reigned after the death of the Colony's Founder. They espoused principles of punishments they implemented into law. They rejected retribution. They accepted deterrence and reformation. And they prohibited any severity unnecessary for achieving those circumscribed aims. Anything more was cruel. And what counted as "more" than necessary was contingent on evolving understanding. This was the prohibition they wrote.

Just as Pennsylvania launched the reform of penal laws in the United States, the Commonwealth also helped launch the revival of state constitutionalism. Its seminal case of 1991 provided a framework for many States across the nation to rediscover their own constitutions. Yet, under Section 13's jurisprudence, nobody today would know of either seminal moments as the Supreme Court of Pennsylvania has ignored the Commonwealth's history and in so doing neglected its own constitutional guarantee against "cruel punishments." That should change—and now.